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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1946

No. 404

MEXICAN LIGHT & POWER COMPANY, LTD.,
PETITIONER,

vs.

THE TEXAS MEXICAN RAILWAY COMPANY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

PETITION FOR CERTIORARI FILED AUGUST 15, 1946.

CERTIORARI GRANTED OCTOBER 14, 1946.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

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MEXICAN LIGHT & POWER COMPANY, LTD.,
PETITIONER,

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THE TEXAS MEXICAN RAILWAY COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

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[fol. 1] [Caption omitted]

[fol. 2]

IN THE DISTRICT COURT OF NUECES COUNTY

No. 15,756-B

MEXICAN LIGHT & POWER COMPANY LTD.,

vs.

THE TEXAS MEXICAN RAILWAY COMPANY

THIRD AMENDED ORIGINAL PETITION—Filed December 6, 1943

Now Comes The Mexican Light and Power Company, Limited, hereinafter called Plaintiff, complaining of The Texas Mexican Railway Company, hereinafter called Defendant, and with leave of the Court first had and obtained, files this its Third Amended Original Petition, and represents to the Court, as follows:

I

Plaintiff is a corporation duly incorporated, organized, created and existing under the laws of the Dominion of Canada, having an office and place of business in the City of Mexico, Mexico, D. F. and is now, and was at the time of the cause of action hereinafter stated, engaged in the light and power business in Mexico, D. F. and is not now and never has been engaged in intrastate business in Texas.

II

That the defendant is now and was at the time the cause of action hereinafter stated arose, and was at all times and dates hereinafter mentioned and material, a railway corporation, duly incorporated, organized, created, existing and doing business under the laws of the State of Texas, and had at all times mentioned and material herein, and now has its line and lines of railroad extending into and through the County of Nueces, and the County of Webb and other counties in said State of Texas, and has a local office at Corpus Christi, Nueces County, Texas, and an agent in charge of such office, upon whom service may be had.

[fol. 3] III

That in all matters and things hereinafter complained of said defendant and its common connecting carriers were acting by and through their respective agents, servants and employees, duly authorized and acting in the conduct of the business of said defendant and its connecting lines.

IV

That the said defendant is now and was at the time the cause of action hereinafter stated arose, and at all times herein mentioned, a common carrier for hire, and, together with its common and connecting carrier, the National Railways of Mexico, owned and operated a connecting and continuous line and lines of railway from Laredo, Texas, to El Oro, Mexico, by way of Acambaro, Mexico, and owned and operated a line and lines of railway between Laredo, Texas, and Corpus Christi, Texas, and the said defendant and its common and connecting carrier were at all times herein mentioned and are now handling the shipment of freight and were and are engaged in the business of transporting freight for hire, as hereinafter described, and were generally conducting the business of common carriers within the meaning of the Transportation Act; United States Code, Title 49, Section 20; and in the transactions hereinafter complained of said defendant was the initial carrier, within the meaning of said act, to whom the goods were delivered for transportation and which defendant did transport; and the said The National Railways of Mexico was what is known and designated as the connecting carrier.

V

That heretofore, on September 29th, 1934, plaintiff, acting by and through its agent and representative, Fausto Trevino, delivered to the said defendant, at Laredo, Texas, the articles hereinafter set forth, which were consigned to plaintiff at El Oro, Mexico, via Acambaro.

VI

That the defendant, acting in the capacity of a common [fol. 4] carrier, accepted said articles, which consisted of three (3) transformers and equipment, as hereinafter specifically set forth, in good condition, to be transported and delivered to plaintiff at said destination of El Oro,

Mexico, and, accordingly, on said date of September 29, 1934, executed, issued and delivered its uniform, straight bill of lading for said articles covering through transportation from Laredo, Texas, to El Oro, Mexico, said bill of lading being issued to the said Fuasto Trevino, who was the agent and representative of plaintiff as shipper, and which bill of lading provided, substantially, as follows:

That said defendant, has received, on said date of September 29, 1934, from Fausto Trevino, the hereinafter described property, in apparent good order, and agreed to carry it to its usual place of delivery at said destination of El Oro, Mexico, subject to valid provisions of said bill of lading, a photostatic copy of which is hereto attached and made a part hereof, as if fully written herein.

VII

That said articles were described as shown by the copy of the bill of lading attached hereto and consisted of the following transformers and equipment, which were then and are now the property of plaintiff:

Item #1

4500 K.V.A. Single Phase, 50 Cycle, Outdoor Oil Immersed Water Cooled, Surge Proof Power Transformers, Primary 96, 500/92, 100/88, 100/85, 750/83, 700/81, 500 Volts, Secondary 3300-6600/3650-7300 Volts, the 81,500 Volt Tap May Be Made for "Reduced Capacity," But All Other Primary and Secondary Taps Shall Have Full K.V.A. Capacity As Per Attached Customers Specifications.

[fol. 5]

Item #2

Slings and Spares as Follows Are to Be Included.

Item #2-A

Spare Primary Bushing.

Item #2-B

Spare Secondary Bushing

Item #2-C

Set of Slings

Item #2-D

Spare Set of Cork Gaskets for One Transformer.

which items were shipped in three (3) cases and ten (10) crates and which were of the reasonable value at the time

and place of such delivery and immediately prior to the injuries hereinafter complained of, in the sum of not less than Eighteen Thousand Five Hundred Dollars ($18,500.00).

VIII

Plaintiff further alleges that said transformers and equipment had just been purchased new and in perfect condition from the Westinghouse Electric International Company and were in perfect condition and had never been used at the time of the delivery to said defendant and its connecting carrier. That, as set forth in said bill of lading hereto attached and marked "Exhibit A", said defendant and its connecting carrier undertook to deliver said goods at El Oro, Mexico, for the usual and customary freight charges, which plaintiff agreed to pay and has duly paid, and said defendant and its connecting carrier thereupon became obligated to deliver said transformers and equipment to plaintiff at said destination in good and perfect condition, and that while said goods were in transit over the lines of said defendant, or its connecting carrier, being The National Railways of Mexico, pursuant to said bill of lading, and by and through the breach of said duty on the part of said defendant and its connection carrier, and by reason of their failure to perform said duty owed this plaintiff, said transformers and equipment, as here- [fol. 6] inabove described, were badly damaged and rendered unserviceable and useless, and said defendant, and its connecting carrier, failed to deliver the said goods to this plaintiff at said destination in good and perfect condition, but caused or permitted said goods to be damaged and rendered unserviceable, as hereinafter set forth, while in transit; and that the acts of said defendant and its connecting carrier, and their officers, agents and representatives, were the proximate cause of the injuries and damages as hereinafter set forth.

IX

Plaintiff alleges that said three transformers and equipment, hereinabove described, were greatly damaged and rendered unserviceable while in transit and in the custody of the said defendant or its connecting carrier, The National Railways of Mexico, and that such injury and damage occurred on or about the 10th day of October, 1934,

while said transformers and equipment were in transit under said conditions on the lines of said connecting carrier, The National Railways of Mexico, and plaintiff is informed and believes and therefore alleges that the injuries occurred between the towns of Acambaro and Tultenango, about one kilometer from the town of Naravatio, Mexico, and plaintiff is informed and believes and therefore alleges that said transformers and equipment and the flat cars upon which they were being transported were overturned while in motion under said conditions, as a result of which said transformers and equipment were greatly damaged and rendered unserviceable, as hereinafter set forth; but, in any event, they were received by said defendant common carrier engaged in Interstate Commerce under the conditions hereinabove set forth in good condition and were not delivered to plaintiff, the rightful owner and consignee thereof, at said destination, in like good condition, as contracted and required, but were damaged and rendered unserviceable while in transit, as hereinabove set forth, and as below alleged.

[fol. 7] That said property above described in Paragraph VII hereof had no market value at El Oro, Mexico, on the 10th day of October, 1934, either immediately before or immediately after the injuries thereto on said date; that the actual value of said property at El Oro, Mexico, on October 10, 1934, immediately before said injuries was not less than Eighteen Thousand Five Hundred Dollars ($18,500.00) and that the actual value thereof at El Oro, Mexico, on the 10th day of October, 1934, immediately after said injuries was not more than Three Thousand Three Hundred and Twenty Dollars ($3,320.00).

That the difference in the actual reasonable value of said property at the time of delivery to said defendant and its connecting carrier, and immediately prior to the acts of said defendant and its connecting carrier, as herein set forth, which damaged and rendered unserviceable said transformers and equipment, and its actual value immediately subsequent thereto, is the sum of not less than Thirteen Thousand Seven Hundred Fifty Dollars ($13,750.00). That in order to repair said transformers and equipment and place the same in serviceable condition, it was necessary that said transformers and equipment be returned to the factory at Sharon, Pennsylvania, where they were manufactured, and that the actual cost of returning

said transformers and equipment to said factory and of repairing the same so as to place them in good serviceable condition, and returning same to El Oro, Mexico, the point of delivery, was the sum of Thirteen Thousand Seven Hundred Fifty Dollars ($13,750,00), which plaintiff was compelled to pay by reason of said acts and breach of duty on the part of said defendant and its connecting carrier, and that the cost of said repairs and transportation was reasonable and necessary to place said transformers and equipment in good serviceable condition and in the good condition in which they were when said defendant receipted for same and issued its said bill of lading therefor at Laredo, Texas, as aforesaid.

[fol. 8] XI

The plaintiff duly filed its claim with said The National Railways of Mexico, on October 12, 1934, and since said date has been continuously, through its agents and attorneys, in correspondence with said defendant and its connecting carrier, the National Railways of Mexico, in reference thereto, and that proper notice and demand were made prior to the expiration of nine months after the delivery of the said merchandise by The National Railways of Mexico, and that said claims were rejected on or about the 29th day of February, 1936, and though demand has been duly made on said defendant and its connecting carrier and said claims filed and notice given as required by the valid provisions of said agreement under which said property was shipped and as provided by law, the said defendant and its connecting carrier have failed and refused to pay to plaintiff said damages or any part thereof, and by reason of said facts, plaintiff has been damaged, as hereinabove set forth, by the wrongful acts of said defendant and its connecting carrier, and has been forced to employ counsel to file suit to recover the same and to incur reasonable attorney's fees for said purposes, which attorney's fees it is entitled to recover of defendant by reason of the provisions of the Act of Congress of February 4, 1887, Chapter 104; 24 Stat. 382; United States Code, Title 49, Chapter 1, Section 8.

XII

That the original letters, reports and correspondence between said parties and reports concerning the matters

herein complained of are not in possession of or available to plaintiff, and defendant is hereby given notice to produce all of the documents and correspondence and reports in possession of it, or its connecting carrier, pertaining to the shipment of said transformers and equipment, as hereinabove set forth, and the overturning of said cars and the acts and injuries, as hereinabove set forth, for use in evidence upon the trial hereof.

[fol. 9] Wherefore, premises considered, defendant having appeared and answered, plaintiff prays that upon a hearing hereof plaintiff have judgment against said defendant in the sum of at least Thirteen Thousand Seven Hundred Fifty Dollars ($13,750.00), together with interest thereon from October 10, 1934, until paid, and reasonable attorney's fees in the sum of Twenty-five Hundred Dollars ($2,500.00), and its costs, and for such other and further relief as it may be entitled to receive.

Fulbright, Crooker, Freeman & Bates, Chas. W. Bell, Attorneys for plaintiff, State National Bank Building, Houston, Texas.

(Here follow 2 photolithographs, side folios 9a, 9b)

Exhibit to Third Amended Original Petition

Form T[illegible]. 311

(Uniform Domestic Straight Bill of Lading adopted by Carriers in Official, Southern and Western Classification Territories, March 10, 1922, as amended August 1, 1930.) 1st SHEET

UNIFORM STRAIGHT BILL OF LADING

Shipper's No. _____

CPY-3980-4693

ORIGINAL—NOT NEGOTIABLE

Agent's No. _____

THE TEXAS MEXICAN RAILWAY COMPANY

RECEIVED, subject to the classifications and tariffs in effect on the date of the issue of this Bill of Lading,

at LAREDO TEXAS 9-29-34, 193__

from FAUSTO TREVIÑO

the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned, and destined as indicated below, which said company (the word company being understood throughout this contract as meaning any person or corporation in possession of the property under the contract) agrees to carry to its usual place of delivery at said destination, if on its own road or its own water line, otherwise to deliver to another carrier on the route to said destination. It is agreed as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions not prohibited by law, whether printed or written, herein contained, including the conditions on back hereof, which are hereby agreed to by the shipper and accepted for himself and his assigns.

(Mail or street address of consignee—For purposes of notification only.)

Consigned to MEXICAN LIGHT & POWER CO LTD

Destination EL ORO State of MEXICO County of _____

Route via ACAMBARO PENNSYLVANIA 474625

Delivering Carrier _____ Car Initial PENNSYLVANIA Car No. 425618

No. Packages	DESCRIPTION OF ARTICLES, SPECIAL MARKS, AND EXCEPTIONS	*WEIGHT (Subject to Correction)	CLASS OR RATE	CHECK COLUMN
	RR CARRO PENN-425618			
2	Cajas 1			
	pre TMex 1302 de 9-28			
	RR CARRO PENN 474625			
3	Piezas TRANSFORMADORES	103750#		
	pre TMex de 9-28			

Subject to Section 7 of conditions, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:

The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges.

FAUSTO TREVIÑO

(Signature of Consignor.)

If charges are to be prepaid, write or stamp here, "To be Prepaid."

Received $ _____ to apply in prepayment of the charges on the property described hereon.

Received $_____ to apply in prepayment of the charges on the property described hereon.

Agent or Cashier.

Per _____

(The signature here acknowledges only the amount prepaid.)

Charges Advanced:

$_____

*If the shipment moves between two ports by a carrier by water, the law requires that the bill of lading shall state whether it is "carrier's or shipper's weight."
NOTE—Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property.
The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding

per

FAUSTO TREVIÑO

Shipper.

Per

Permanent postoffice address of Shipper

per

EMS EXCANPY.

Agent.

Per

1

9a

CONTRACT TERMS AND CONDITIONS

Sec. 1. (a) The carrier or party in possession of any of the property herein described shall be liable as at common law for any loss thereof or damage thereto, except as hereinafter provided.

(b) No carrier or party in possession of all or any of the property herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, the public authority, or the act or default of the shipper or owner, or the inherent nature of the goods. The carrier's liability shall be that of warehouseman, only, for loss, damage, or delay caused by the carrier after the expiration of the free time allowed by carrier tariffs in which property may be entitled on the through bill of lading, or if no free time is allowed, then after the expiration of a reasonable time for which property may be held subject to carrier tariffs, after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination, or tender of delivery of the property to the party entitled to receive it, has been made. Nothing in case of negligence of the carrier or party in possession shall the burden to prove freedom from such negligence shall be on the carrier or party in possession, and the carrier or party in possession shall not be liable for loss, damage, or delay occurring while the property is stopped and held in transit upon the request of the shipper, owner, or party entitled to make such request, or resulting from a defect or vice in the property, or for country damage to cotton, or leakage of grain.

(c) In case of quarantine the property may be discharged at risk and expense of owner into quarantine depot or elsewhere, as required by quarantine regulations or authorities, or for the carrier's dispatch at nearest available point to carrier's independent line of any such quarantine depot or elsewhere, as required by quarantine regulations or authorities, or for the carrier's dispatch at nearest available point to carrier's independent line of any such quarantine depot or elsewhere when property is so discharged, or property may be removed by carrier at owner's expense to shipping point, carrying freight both ways. Quarantine detention of whatever nature or however caused or imposed shall be borne by the owners of the property or be a lien thereon. The carrier shall not be liable for loss or damage occasioned by quarantine detention or other delay required or done by quarantine regulations or authorities given though the same may have been done by carrier's officers, agent(s) or employees, nor for detention, loss or damage by any kind occasioned by quarantine or the enforcement thereof. No carrier shall be liable, except in case of negligence, for any mistake or inaccuracy in any information furnished by the carrier to shipper, consignee, or to quarantine boat or regulators. The shipper shall hold the carriers harmless from any expenses they may incur, or damages they may be required to pay, by reason of the introduction of the property by the carrier into any place against the quarantine laws or regulations in effect at such place.

Sec. 2. (a) No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market or otherwise than with reasonable dispatch. Every carrier shall have the right in case of physical necessity to forward said property by any route or routes between the point of shipment and the point of destination. In all cases not prohibited by law, where a lower value than actual value has been represented in writing by the shipper or has been agreed upon in writing as the released value of the property as determined by the classification or tariffs upon which the rate is based, such lower value plus freight charges if paid shall be the measure of value to which loss or damage may be adjusted.

(b) As a condition precedent to recovery, claims must be filed in writing with the receiving or delivering carrier, or carrier issuing this bill of lading, or carrier on whose line the loss, damage, injury or delay occurred, within nine months after delivery of the property (or, in case of export traffic, within nine months after delivery of part of export) or, in case of failure to make delivery, then within nine months after a reasonable time for delivery has elapsed; and suits shall be instituted against any carrier only within two years and one day from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice. Where claims are not filed or suits are not instituted thereon in accordance with the foregoing provisions, no carrier hereunder shall be liable, and such claims will not be paid.

(c) Any carrier or party liable on account of loss of or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property, so far as this shall not avoid the policies or contracts of insurance: Provided, That the carrier reimburses the claimant for the premium paid thereon.

Sec. 3. Except where such carrier is required as the result of carrier's negligence, all property shall be subject to necessary cooperage and baling at owner's cost. Each package may whose route extends or rates have been fixed in part upon the basis of a minimum weight, shall be loaded to such minimum weight, if its contents will justify it, and shall not be held responsible for detention or unavoidable delays in procuring such cooperage, baling or loading. Unless otherwise expressly noted herein, each carrier over whose line property is to be transported to point of destination shall be deemed to have accepted it in good order, except as noted (contents and condition of contents of packages unknown), and shall not be held responsible for loss or damage committed subsequent to the receipt of the property, and prior to the time that the same shall be delivered to the consignee, or tendered for such delivery, or to the next carrier, except that any carrier delivering property to a connecting carrier for transportation to destination, or to any point through which the property is routed, shall be liable for any loss or damage occurring after such delivery, caused by the negligence or default of such connecting carrier, or any carrier to whose line such property may be transferred during transportation, and subject to the same liability in respect thereto which attaches to the first carrier for loss or damage caused by its negligence or default during the time the property is in its possession. Each carrier performing a switching service shall be liable as a carrier for the property while being handled by it and for any delay in switching and forwarding the same.

Sec. 4. (a) Property not removed by the party entitled to receive it within the free time allowed by tariffs lawfully on file (such free time to be computed as therein provided) after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination has been made, may be kept in vessel, car, depot, warehouse or place of delivery of the carrier, subject to the tariff charge for storage and to carrier's responsibility as warehouseman, only, or at the option of the carrier, may be removed by and stored in a public or licensed warehouse at the risk of owner and there held without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage.

(b) Where perishable property which has been transported by carrier is refused by consignee or the party entitled to receive it, or said consignee or party entitled to receive it fails to receive it within 15 days after notice of arrival shall have been duly sent or given, the carrier may sell the same at public auction to the highest bidder, at such place as may be designated by the carrier: Provided, That the carrier shall have first mailed, sent, or given to the consignee notice that the property has been refused or specific instructions are the case may be, and that it will be subject to sale under the terms of the bill of lading if disposition be not arranged for, and shall have published a notice containing a description of the property, the name of the party to whom consigned, or, if shipped order notify, the name of the party to be notified, and the time and place of sale, once a week for two consecutive weeks, in a newspaper of general circulation at the place of sale or nearest place where such newspaper is published: Provided, That 30 days shall have elapsed before publication of notice of sale after mail notice that the property was refused or was not claimed was mailed, sent, or given.

(c) Where perishable property which has been transported hereunder is destroyed or refused by consignee or party entitled to receive it, or said consignee or party entitled to receive it shall fail to receive it promptly, the carrier may, in its discretion, to prevent deterioration or further deterioration, sell the same to the best advantage at private or public sale: Provided, That if time serves for notification to the consignee or owner of the refusal of the property or the failure to receive it and request for disposition of the property, such notification shall be given, in each manner as the exercise of due diligence requires, before the property is sold.

(d) Where the provisions provided for in the two paragraphs last preceding is not specific, it is agreed that nothing contained in said paragraphs shall be construed to abridge the right of the carrier at its option to sell the property under such circumstances and in such manner as may be authorized by law.

(e) The proceeds of any sale made under this section shall be applied by the carrier to the payment of freight, demurrage, storage, and any other lawful charges and the expenses of notice, advertisement, sale and the other necessary expense and of caring for and maintaining the property, if proper care of the same required special expense, and should there be a balance it shall be paid to the owner of the property sold hereunder.

(f) Property destined to or taken from a station, wharf, or landing at which there is no regularly appointed freight agent shall be entirely at risk of owner after unloaded from cars or vessels or such facility has cars or vessels, and, except in case of carrier's negligence, when received from or delivered to such stations, wharves, or landings shall be at owner's risk until the cars are attached to and after they are detached from locomotive or train or until loaded into and after unloaded from vessels.

Sec. 5. No carrier hereunder will carry or be liable in any way for any documents, specie, or for any articles of extraordinary value not specifically rated in the published classifications or tariffs unless a special agreement to do so and a stipulated value of the articles are indorsed hereon.

Sec. 6. Every party, whether principal or agent, shipping explosives or dangerous goods, without previously full written disclosure to the carrier of their nature, shall be liable for and indemnify the carrier against all loss or damage caused by such goods, and such goods may be unloaded at any place or destroyed without compensation.

Sec. 7. The owner or consignee shall pay the freight and charges, if any, and all other lawful charges accruing on said property; but except in those instances where it may lawfully be authorized to do so, no carrier by railroad shall deliver or relinquish possession at destination of the property covered by this bill of lading until all tariff rates and charges thereon have been paid. The consignee shall be liable for the freight and all other lawful charges, except that if the consignee refuses delivery of the property, or refuses to pay freight and charges, or refuses to permit the carrier to collect the same from the consignee, by signature, in the space provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignee (except as hereinafter provided) shall not be liable for such charges. Provided, that where the carrier has been instructed by the shipper or consignee to deliver said property to a consignee other than the shipper or consignee, such consignee shall not be legally liable for transportation charges in respect of the transportation of said property (unless plainly billed against him at the time of delivery for which he is otherwise liable) which may be found to be due after the property has been delivered to him, if the consignee (a) is an agent only and has no beneficial title in said property, and (b) prior to delivery of said property has notified the delivering carrier in writing, of the fact of such agency and disclosure of the name and address of the beneficial owner of said property; and, in such cases the shipper or consignee, or, in the case of a shipment to consignment or reported, the beneficial owner, shall be liable for such additional charges. If the consignee has given to the carrier erroneous information as to the beneficial owner in such consignee shall himself be liable for such additional charges. Nothing herein shall limit the right of the carrier to require at time of shipment the prepayment or guarantee of the charges. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped.

Sec. 8. If this bill of lading is issued on the order of the shipper, or his agent, in exchange or in substitution for another bill of lading, the shipper's signature to the prior bill of lading as to the statement of value or otherwise, or election of carriers by or bill of lading liability, in or in connection with such prior bill of lading, shall be considered a part of this bill of lading as fully as if the same were written or made in or in connection with this bill of lading.

Sec. 9. (a) If all or any part of said property is carried by water over any part of said route, such water carriage shall be performed subject to all the terms and provisions of, and all the exemptions from liability contained in, the Act of the Congress of the United States, approved on February 13, 1893, and entitled "An act relating to the navigation of vessels, etc.," and of other statutes of the United States amending, modifying or supplementing said Act, and to the conditions contained in this bill of lading not inconsistent therewith or with this section.

(b) No such carrier by water shall be liable for any loss or damage resulting from any fire happening to or on board the vessel, or from explosion, bursting of boilers or breakage of shafts, unless caused by the design or neglect of such carrier.

(c) If the carrier shall have exercised due diligence in making the vessel in all respects seaworthy and properly manned, equipped, and supplied, no such carrier shall be liable for any loss or damage resulting from the perils of the lakes, seas, or other waters, or from latent defects in hull, machinery, or appurtenances whether existing prior to, at the time of, or after sailing, or from collision, stranding, or other accidents of navigation, or from prolongation of the voyage. And, when for any reason it is necessary, any vessel carrying any or all of the property herein described shall be at liberty to call at any port or ports, in or out of the customary route, to tow and be towed, to transfer, tranship, or lighter, to load and discharge goods at any time, to assist vessels in distress, to deviate for the purpose of saving life or property, and for docking and repairs. Except in case of negligence such carrier shall not be responsible for any loss or damage to property if it be necessary or is usual to carry the same upon deck.

(d) General Average shall be payable according to the York-Antwerp Rules of 1924, Sections 1 to 15, inclusive, and Sections 17 to 22, inclusive, and as to matters not covered thereby according to the laws and usages of the Port of New York. If the owners shall have exercised due diligence to make the vessel in all respects seaworthy and properly manned, equipped and supplied, it is hereby agreed that in case of danger, damage or disaster resulting from faults or errors in navigation or in the management of the vessel, or from latent defects in the vessel, her machinery or appurtenances, or from unseaworthiness, whether existing at the time of shipment or at the beginning of the voyage (provided the latent or other defects or the unseaworthiness was not discoverable by the exercise of due diligence), the shipper, consignee and/or owners of the cargo shall severally pay salvage and any special charges incurred in respect of the cargo, and shall contribute with the shipowner in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred for the common benefit or to relieve the adventure from any common peril.

(e) If the property is being carried under a tariff which provides that any carrier or carriers party thereto shall be liable for loss from perils of the sea, then as to such carrier or carriers the provisions of this section shall be modified in accordance with the tariff provisions, which shall be regarded as incorporated into the conditions of this bill of lading.

(f) The term "water carriage" in this section shall not be construed as including lighterage in or across rivers, harbors, or inlets, when performed by or on behalf of rail carriers.

Sec. 10. Any alteration, addition, or erasure in this bill of lading which shall be made without the special notation hereon of the agent of the carrier issuing this bill of lading, shall be without effect, and this bill of lading shall be enforceable according to its original tenor.

(Revised August 1, 1930)

[fol. 10] [File endorsement omitted.]

[fol. 11] IN THE DISTRICT COURT OF NUECES COUNTY

DEFENDANT'S FOURTH AMENDED ORIGINAL ANSWER—FILED DEC. 9, 1943

[Title omitted]

Now comes the Defendant, The Texas Mexican Railway Company, and files this its Fourth Amended Original Answer to the Plaintiff's Third Amended Original Petition, and for such answer says:

I

That said petition states no facts sufficient in law to require answer, and of this general exception Defendant prays judgment.

II

In event the foregoing general exception be overruled, this Defendant then specially excepts to said petition in the following particulars and for the following reasons, to-wit:

(a) To the notice contained in the petition for this Defendant to produce all the documents, correspondence and reports in its possession, for the reason that such allegation is improper and too general, and the Plaintiff has no right to demand, and the Defendant is not required to comply with, a blanket demand of this sort;

(b) To the notice contained in the petition for this Defendant to produce all the documents, correspondence and reports of the connecting carried pertaining to said shipment, for the same reasons urged in the next preceding special exception (a), and for the additional reason that there is no allegation of fact to show that this Defendant had any control over any of the documents, correspondence or reports which might be in possession of its connecting carrier.

(c) To the allegation contained in Par. IV to the effect that Defendant and the National Railways of Mexico, "were at all times herein mentioned and are now handling the shipment of freight for hire as hereinafter described, and [fol. 12] were generally conducting the business of general carriers within the meaning of the Transportation Act,

U. S. Code, Title 49, Sec. 20, and in the transactions hereinafter complained of said Defendant was the initial carrier within the meaning of said Act to whom the goods were delivered for transportation and which Defendant did transport"; for the reasons:

(1) Said allegation is a conclusion of mixed fact and law;

(2) It appears from the petition that the shipment made the basis of this suit involved commerce between this Defendant and a carrier in an adjoining foreign country, and the right of recovery in this suit is expressly based upon application of Sec. 20, Par. 11 of said Act, and Congress has by Title 49, Sec. 6, Par. 17 USCA expressly forbidden any carrier, unless otherwise provided by said Act, to engage or participate in the transportation of property as defined in said Act unless the rates and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of said Act, and by Par. 1 of said section has required every common carrier subject to said Act to file with the Interstate Commerce Commission and keep open to the public printed schedules showing all rates and charges for transportation between points on its own route and that of any connecting carrier when a through and joint rate has been established, and schedules shall plainly state the places between which property will be carried and shall contain the classification of freight in force and other charges which the Commission may require and shall be plainly printed in large type, and copies for use of the public shall be kept posted in two public, conspicuous places in every depot where freight is received for transportation, and such provision shall apply to all traffic defined in said chapter, and by Par. 10 of said section a penalty is imposed for violation of any requirement of said chapter. There is no allegation of fact that any through and joint rate existed or exists between Laredo, Texas, and El Oro, Mexico, that the alleged bill of lading stated any such rate, [fol. 13] or that Plaintiff promised to pay any such rate or pay any rate for service in Mexico in which this Defendant participated, or that any such rate had been filed with the Interstate Commerce Commission and kept open to public inspection, or that any schedule thereof was or had been posted as required by said Act. The Supreme Court of the United States, whose holdings with respect to said

requirements are conclusive and binding in this suit, in which recovery is based upon said Act, has definitely held that all purported contracts or bills of lading attempted to be issued from a point in the United States to a point in a foreign country, where the provisions with respect to posting tariffs had not been complied with, are illegal and void and will not support a cause of action, thereby making said requirements essentially conditions precedent to liability under the provisions of Sec. 20 of said Act on which this suit is founded.

Plaintiff should be required, before further proceeding in this cause, to affirmatively allege each of said essential precedent conditions of fact.

(d) To the allegation in Par. VI that this Defendant "on said date of Sept. 29, 1934, executed, issued and delivered its uniform, straight bill of lading for said articles covering through transportation from Laredo, Texas, to El Oro, Mexico, said bill of lading being issued to the said Fausto Trevino, who was the agent and representative of plaintiff as shipper, and which bill of lading provided, substantially, as follows:

That said defendant has received, on said date of September 29, 1934, from Fausto Trevino, the hereinafter described property, in apparent good order, and agreed to carry it to its usual place of delivery at said destination of El Oro, Mexico, subject to valid provisions of said bill of lading, a photostatic copy of which is hereto attached and made a part hereof, as if fully written herein," for the reasons:

[fol. 14] (1) For each respective ground of exception contained in exception "(c)" above.

(2) Among other things contained on the alleged bill of lading, photostatic copy of which is attached to said petition, it is expressly made subject to all the conditions contained thereon and on the back thereof, among which, on the face thereof, is that the property was "received subject to the classifications and tariffs in effect on the date of the issue of this bill of lading," and that Defendant "agrees to carry to its usual place of delivery at said destination or on its own water line (it affirmatively appears from the allegations of the petition that the destination was neither); otherwise, to deliver to another carrier on the route to said

destination," and that "all of the obligations thereunder shall be subject to all the conditions not prohibited by law." It further appears from said exhibit that the columns for classification and rate were utterly blank, and said exhibit exacted an allegation of fact to make the alleged bill of lading operative as a contract for through carriage under the Interstate Commerce Act that the existence and character of classifications and tariffs, if any, to which the alleged bill of lading was subject, be alleged with reasonable particularity.

(3) The allegation that the obligation of Defendant was "subject to valid provisions of said bill of lading" is too general and indefinite, and at no place in the petition are the alleged valid provisions pointed out, nor the alleged invalid provisions, and there may be no valid provisions without an affirmative allegation of fact to show that the alleged bill of lading was issued under conditions permitted by said Interstate Commerce Act to give it vitality.

(e) To the allegation in Par. VIII, reading as follows:

"That, as set forth in said bill of lading hereto attached and marked "Exhibit A", said defendant and its connecting carrier undertook to deliver said goods at El Oro, Mexico, [fol. 15] for the usual and customary freight charges, which plaintiff agreed to pay and has duly paid, and said defendant and its connecting carrier thereupon became obligated to deliver said transformers and equipment to plaintiff at said destination in good and perfect condition, and that while said goods were in transit over the lines of said defendant, or its connecting carrier, being The National Railways of Mexico, pursuant to said bill of lading, and by and through the breach of said duty on the part of said defendant and its connection carrier, and by reason of their failure to perform said duty owed this plaintiff, said transformers and equipment, as hereinabove described, were badly damaged and rendered unserviceable and useless, and said defendant, and its connecting carrier, failed to deliver the said goods to this plaintiff at said destination in good and perfect condition, but caused or permitted said goods to be damaged and rendered unserviceable, as hereinafter set forth, while in transit and that the acts of said defendant and its connecting carrier, and their officers, agents and representatives, were the proximate cause of the in-

juries and damages as hereinafter set forth," for the following reasons"

"(1) For each respective ground of exception presented severally in Pars. (c) and (d) above.

(2) To that portion of said allegation that Defendant undertook the alleged carriage for the "usual and customary freight charges, which Plaintiff agreed to pay and has duly paid," because said allegation is a conclusion, is too general, does not allege with reasonable particularity any facts to show that there existed any usual and customary freight charge from Laredo, Texas on the line of this Defendant to El Oro, Mexico, and is immaterial and irrelevant for the reason that the requirements of the Interstate Commerce Act, USCA Title 49, Sec. 6, Pag. 1, and Sec. 6, Par. 7, may not be avoided by any alleged custom.

(f) The allegation in Par. IX that:

[fol. 16] "They were received by said defendant common carrier engaged in Interstate Commerce under the conditions hereinabove set forth in good condition and were not delivered to plaintiff, the rightful owner and consignee thereof, at said destination, in like good condition, as contracted and required."

for the following reasons: For each respective ground of exception tendered in Pars. (c) and (d) above.

(g) To the allegation contained in Par. X that the Defendant "Issued its said bill of lading therefor at Laredo, Texas, as aforesaid," for the following reasons: For each respective ground of exception contained in Pars. (c) and (d) above.

Wherefore, Defendant prays judgment upon each of the respective foregoing special exceptions.

Kleberg & Eckhardt, E. H. Borchers, J. D. Dodson,
Attorneys for Defendant.

III

In event further answer be required, this Defendant denies generally the allegations of fact contained in said amended original petition and demands strict proof thereof,

and upon a hearing prays that it go hence without day and recover its costs.

Kleberg & Eckhardt, E. H. Borchers, J. D. Dodson,
Attorneys for Defendant.

IV

If further answer be required, Defendant says the instrument sued upon will not sustain a cause of action against Defendant for negligence of The National Railways of Mexico by reason of the facts hereinafter set forth, because:

(1-a) At the time said instrument was executed and delivered it was not intended nor understood by either party that thereby Defendant was assuming toward Plain-[fol. 17] tiff responsibility for negligence beyond the line of Defendant.

(2-B) There was no consideration for the execution and delivery of said instrument as a contract of Defendant to pay Plaintiff damages for negligence of The National Railways of Mexico nor beyond the line of Defendant.

(3-c) Defendant is a railway corporation established and operating under the laws of Texas, and any attempt by it to contract for liability to Plaintiff for damages caused said shipment beyond the line of Defendant was ultra viræs and contrary to public policy.

(4-d) If said instrument was intended as a contract for through carriage from Laredo, Texas, to El Oro, Mexico, as such it was illegal and void for having been issued in violation of Title 49, Sec. 6, Pars. 1 and 7, USCA, Interstate Commerce Act.

(5-e) The instrument sued upon is not a bill of lading within the meaning of Title 49, Sec. 20, Par. 11, USCA, Interstate Commerce Act, because said statute contemplates a valid, legal bill of lading issued in respect for said Act, and the instrument sued on was not such bill of lading.

2. (a) That if the shipment described in the petition of Plaintiff was damaged after having come into the possession of this Defendant, such damage did not occur while in its possession, but after said shipment had been deliv-

ered to the National Railways of Mexico at the end of this Defendant's line of railway at the boundary line between the United States and Mexico, at Laredo, Texas.

(b) That said shipment originated at Sharon, in the State of Pennsylvania, and was there received by the Pennsylvania Railroad Company, which issued its bill of lading for said shipment; said bill of lading was to Laredo, Texas, only and was not a through bill of lading to El Oro, in the Republic of Mexico, but it did disclose on its face that said shipment was originally intended by Plaintiff to move in continuous and unbroken sequence from Sharon, Pennsylvania, to Laredo, Texas, thence to El Oro in the Republic of Mexico. In order to accomplish said movement it was [fol. 18] necessary that this Defendant deliver said shipment to said National Railways of Mexico at the boundary aforesaid, and the bill of lading issued at Sharon, Pennsylvania, to Laredo, Texas, was in fact a direction to this Defendant so to do in that the consignee therein named was The Mexican Light & Power Company, Ltd., National Railways of Mexico, c/o Fausto Trevino, Customs Agent, and said bill of lading stated therein that the shipment was for export to El Oro in the Republic of Mexico. At said time tariffs having the force and effect of law were duly on file with the Interstate Commerce Commission, which provided two different rates on shipments moving by rail from Sharon, Pennsylvania, to Laredo, Texas; one rate was a domestic rate of $1.58 per hundred, which applied if the shipment was destined to Laredo, Texas, and if this Defendant was the destination and not an intermediate carrier; the other was an export rate of $1.40 per hundred which applied if said shipment was originally destined not for Laredo, but for export to the Republic of Mexico, at Laredo, Texas, and if the shipper so declared at the time the bill of lading was issued. Plaintiff so declared and claimed the benefit of said export rate at the time of shipment, and thereby represented the true fact, which was, that said shipment was not for destination at Laredo, Texas, but was originally moving for export as aforesaid, and that the handling of said shipment by this Defendant, which participated only in said export rate, was that of an intermediate carrier whose duty should be discharged upon safely delivering said shipment to the rails of the National Railways of Mexico which connect with

those of this Defendant at the boundary line at Laredo, Texas, to be transported thence to El Oro in the Republic of Mexico. Said export rate which was applied to said shipment at Sharon, Pennsylvania, and paid by Plaintiff, covered all tariff and transportation charges accruing to lines in the United States from Sharon, Pennsylvania, to said boundary line between the United States and the Republic of Mexico at Laredo, Texas. Plaintiff received and [fol. 19] retained the benefit of the export rate aforesaid and thereby saved in freight charges more than $200.00, which it would have paid had the shipment been made for ultimate destination at Laredo, Texas, and with this Defendant a destination carrier of said shipment in its movement from Sharon, Pennsylvania.

(c) This Defendant owns no line of railway extending into the Republic of Mexico and has no interest in nor control over any line of railway within the Republic of Mexico, and derived no revenue from the movement of said shipment over any line of railway in the Republic of Mexico, and no thru joint rate had been established or existed covering said shipment or any other shipment from Laredo to El Oro, and no schedules of such rates were posted or otherwise held out to the public, and if said instrument executed and held by the Defendant to Fausto Trevino and here sued upon was intended as a thru bill of lading and contract for carriage by the Defendant (which intention is denied), the same would not sustain a cause of action, for, as such, it was expressly forbidden by Title 49, Sec. 6, Par. 7, USCA under a penalty, and therefore illegal and void.

(d) In order to effect export of said shipment into the Republic of Mexico and uninterrupted movement, it was necessary, and if not necessary it was the general well-known and long established custom at Laredo, Texas, that the consignee or some agent for the consignee should make arrangements with the customs authorities for the Republic of Mexico for the admission of such shipments into said Republic, and with knowledge of said custom and requirement Plaintiff caused notation to be made upon said bill of lading at Sharon, Pennsylvania, that the consignee of said shipment at Laredo, Texas, was the National Railways of Mexico, c/o Fausto Trevino, Customs Broker. The said Fausto Trevino was in fact a customs broker at Laredo,

Texas, whose business it was to effect export of said shipments and the delivery thereof to the National Railways of [fol. 20] Mexico. By such designation Plaintiff made said Fausto Trevino its agent to arrange compliance with the customs laws of Mexico and to procure entry of said shipment into the Republic of Mexico by delivering the same to the National Railways of Mexico at the boundary line at Laredo, Texas, which said agent did in fact do.

(e) That at the request of said agent and in keeping with said custom, and as an accommodation to said agent, and without additional compensation to this Defendant, and with no legal obligation upon it so to do, nor reward promised nor to be received by it therefor, but as part of the mechanics to aid in the movement which Plaintiff desired to be accomplished without interruption, and not to evidence that this Defendant had received said shipment as an original shipment, all parties well knowing that this Defendant had not received said shipment for transportation except for the purpose of completing delivery of said shipment to the National Railways of Mexico as aforesaid, and not to evidence any obligation assumed by this Defendant beyond its own lines, nor after delivery of the shipment to said National Railways of Mexico, all as was well known to Plaintiff and to its said agent, Defendant issued in form its bill of lading upon which to effect delivery of said shipment to the National Railways of Mexico as aforesaid; said bill of lading was intended merely as a receipt and as shipping directions and upon its face showed that there was no rate nor charge made therefor. This Defendant received no compensation nor promise thereof, except from the revenue derived from the export rate paid upon said shipment for moving the same from Sharon, Pennsylvania, to the boundary line aforesaid, and this Defendant in fact received no consideration for the execution and delivery by it of its bill of lading in the form as aforesaid upon which to found any liability against this Defendant after the completion by it of delivery to the National Railways of Mexico, and Defendant alleges that it was an intermediate and neither an originating nor delivering carrier of said [fol. 21] shipment, either in fact or in contemplation of the Cummins Amendment to the Transportation Act, known as 49 USCA, Par. 20, Section 11.

(f) Upon the facts aforesaid, this Defendant affirmatively alleges:

First: That in fact and within the meaning of 49 USCA, Par. 20, Section 11, known as the Cummins Amendment to the Transportation Act, the Pennsylvania Railroad, and not this Defendant, was the carrier which received the shipment for transportation from a point within the United States to El Oro in the Republic of Mexico.

Second: That in fact and within the meaning of 49 USCA, Par. 20, Section 11, known as the Cummins Amendment to the Transportation Act, with respect to said shipment as one originating at Sharon, Pennsylvania, with the intention and direction that it should move without interruption for export and for delivery to the National Railways of Mexico at Laredo, Texas, to be transported thence to El Oro in the Republic of Mexico, this Defendant acted as an intermediate and not as an initial nor as a delivering carrier.

Third: That the obligation of liability upon an initial carrier imposed by said amendment with respect to shipments originating within the United States with the intention and direction that such shipments are for export and to be delivered to the National Railways of Mexico at the boundary line to complete such export, was not intended by Congress to apply where no contractual agreements between the transportation lines in the country and the National Railways of Mexico existed either with respect to the issuance of through bills of lading or for the sharing by the lines in this country of rates charged against and revenues received for such transportation beyond said boundary line, and no such contractual agreement or arrangement exists or existed between any carrier in the United States which handled said shipment and the National Railways of Mexico, or any other railway in Mexico, and in such situation it was not intended by Congress that [fol. 22] any line of railway in the United States or this Defendant, by making more delivery of a shipment originating upon another line for export to the National Railways of Mexico at the boundary line aforesaid, should become an insurer to the shipper for loss or damage which might be imposed upon the shipment in the foreign country and after its safe delivery to said National Railways of Mexico at the boundary line. In this connection this

Defendant alleges the fact to be that here said National Railways of Mexico refused to furnish to this Defendant any information with respect to said shipment, and wholly disclaimed any responsibility to this Defendant with respect to said shipment, and this Defendant is without remedy or contract right to secure any information from the National Railways of Mexico with respect to said shipment.

Fourth: That the bill of lading in the form issued by this Defendant as aforesaid will not sustain a cause of action for any liability to be imposed upon this Defendant after the safe delivery by it of said shipment to the National Railways of Mexico at the boundary line aforesaid for the reason that there was no consideration for the issuance of said bill of lading, and it was issued solely for the convenience of the agent of Plaintiff as aforesaid, and as part of the mechanics to effect uninterrupted delivery of said shipment to the National Railways of Mexico at the boundary line as directed by and in behalf of Plaintiff when the shipment originated at Sharon, Pennsylvania.

Fifth: The instrument executed and delivered by Defendant on 9/29/34 is, as matter of law, wholly insufficient to evidence, and was not intended by either party when executed to be a contract for a through bill of lading as contemplated by Title 49, Sec. 20, Par. 11, USCA, for this: It was delivered to Fausto Trevino, who was in fact customs broker acting as agent for Plaintiff in importing said shipment from the international boundary line, which [fol. 23] was the terminus of Defendant's road, into the Republic of Mexico; it was on its face, "subject to the classifications and tariffs in effect on the date of the issue of this bill of lading"; there was not on such date any tariff in effect applicable to said shipment as a through shipment from any point on the line of Defendant's road to El Oro, Mexico; by its terms the agreement was, "to carry to its usual place of delivery at said destination, if on its own road or its own water line, otherwise to deliver to another carrier on the route to said destination"; said destination, to-wit, El Oro, Mexico was not on the road of Defendant; Defendant owned no water line; and it made safe delivery of said shipment to another carrier on the route to rail destination, to-wit, the National Railways of Mexico at the international boundary line, which is the terminus of Defendant's line.

Sixth: If defendant be mistaken in the allegations aforesaid that said instrument as matter of law is insufficient as a through bill of lading upon which to hold this Defendant liable to Plaintiff for damages to its property by Mexican Lines in the Republic of Mexico, this Defendant then pleads in the alternative that said instrument was not issued as, nor intended by either this Defendant or the said Fausto Trevino to be and to constitute, a through bill of lading, and that such intent is evidenced by express language therein contained and by the failure to stipulate for any rate or compensation to this Defendant for the issuance thereof or for transportation beyond its own line, for this: Said bill of lading expressly recited that it is a uniform domestic straight bill of lading; that the shipment was "received, subject to the classifications and tariffs in effect on the date of the issue of this bill of lading"; and, "agrees to carry (said shipment) to its usual place of delivery at said destination, if on its own road or its own water line, otherwise to deliver to another carrier on the route to said [fol. 24] destination." Said form of bill of lading was in general use for domestic shipments within the United States and was not a form of bill of lading to contract for safe carriage of goods in Mexico, and any contractual obligation for transporting the shipment from Texas into Mexico would call for an export and not for a domestic bill of lading. No tariffs were in effect in the United States on the date of the issue of the bill of lading applicable to said shipment beyond the line of this Defendant; no rate was agreed upon or promised to be paid for transporting the shipment beyond the lines of the Texas Mexican Company. No obligation was imposed upon the Texas Mexican Company to issue a through bill of lading from Laredo, Texas, to El Oro, Mexico, subjecting itself to liability as initial carrier under the Cummins Amendment; said Amendment expressly relieved Defendant from liability beyond its own line with respect to negligence in the Republic of Mexico, unless the Defendant voluntarily assumed such obligation by issuing a through bill of lading evidencing its contract to safely deliver in Mexico; the Defendant had the lawful right to expressly limit by contract its obligation to deliver only to a connecting carrier on the route to the destination in Mexico; under the bill of lading issued at Sharon, Pennsylvania, contracting to transport the shipment to Laredo for export, the obligation of this Defendant

to deliver said shipment at the international boundary line, which is a terminus of Defendant's line, and there deliver said shipment to the National Railways of Mexico, continued until it completed such delivery; all compensation received by or promised to Defendant arose out of the prepayment for said delivery. Prior to such delivery this Defendant was receipted for said shipment by the customs broker agent for Plaintiff to whom said shipment was consigned; for his accommodation and to evidence the continuing obligation of the Defendant to deliver said shipment at the international boundary line, said instrument was in fact executed and delivered.

Seventh: If it be held that the instrument executed and delivered by Defendant to Fausto Trevino, Customs Broker, [fol. 25] was supported by a consideration for and intended as a contract to safely transport the property therein described to El Oro, Mexico, (which Defendant denies), then to said extent and to evidence such contract, the same was illegal and void and will not support a cause of action for being forbidden by Title 49, Sec. 6, Par. 7, USCA.

After said shipment arrived at El Oro, Mexico, Plaintiff presented and unsuccessfully urged against the National Railways of Mexico claim for the identical damages now urged against this Defendant as initial carrier; no claim was presented to this Defendant by or in behalf of Plaintiff until March, 1936 and after Plaintiff was unable to make any collection thereon from the National Railways of Mexico. Thereafter said claim was then presented by Bigham, Englar, Jones & Houston, Counsellors at Law, 99 John Street, New York, as attorneys for Plaintiff, by letter dated March 5, 1936, addressed to The Texas Mexican Railway Company at Laredo, Texas. That written notice was acknowledged by C. M. Fish, then Traffic Manager of Defendant, by letter dated March 11, 1936; said attorneys for Plaintiff replied by letter dated March 17, 1936, and said Traffic Manager of Defendant by letter dated April 15, 1936, declined said claim. Plaintiff is given notice to produce said original letters, and if said attorneys were not authorized to present said claim to this Defendant for Plaintiff, then it never presented any claim before suit. About September, 1936, Plaintiff filed its suit against the Pennsylvania Railroad Company in Philadelphia for damages for the identical negligence for which Plaintiff seeks to hold this Defendant in this suit, and under oath there alleged

that said Pennsylvania Railroad Company which issued the original bill of lading at Sharon, Pennsylvania, on September 20, 1934, was the initial carrier and as such was liable for the negligence which it is in this suit alleged this Defendant is liable for as initial carrier. Plaintiff unsuccessfully prosecuted to Judgment its said suit against the Penn-
[fol. 26] sylvania Railroad Company and now charges that this Defendant was in fact the initial carrier and must pay Plaintiff for the negligence of the Railways in Mexico.

By reason of all the facts aforesaid this Defendant alleges that it was not intended nor understood by either this Defendant or by Plaintiff and its said agent Fausto Trevino that the bill of lading issued by this Defendant for said shipment was or should be a through bill of lading evidencing the contract of this Defendant to safely deliver said shipment to El Oro, Mexico, and assume liability to Plaintiff for the Negligence of the National Railways of Mexico committed in the Republic of Mexico. This Defendant alleges that said bill of lading was issued by it and was delivered to and accepted by said agent with the intention and the understanding on the part of both that it was merely a receipt and evidence of the obligation of this Defendant to safely deliver said shipment at the international boundary line and to the National Railways of Mexico as a connecting carrier on the route to El Oro, Mexico, and for his convenience in accomplishing legal importation of said shipment into Mexico. Plaintiff alleges that the true intent and understanding aforesaid is not inconsistent with the language used in the bill of lading and the attending facts and circumstances, and if inconsistent, it is the result of mutual mistake and a failure to make said bill of lading speak said true intention and understanding which should be given effect.

8. If said instrument was intended to obligate Defendant to pay for damages sustained by negligence beyond the line of Defendant, it was to that extent ultra viraes and contrary to public policy.

PRAYER

Wherefore, premises considered, Defendant prays upon a hearing that Plaintiff recover nothing and Defendant go hence without day and recover its costs, and for general relief.

Kleberg & Eckhardt, E. H. Borchers, J. D. Dodson.

[fol. 27] Copy of this Pleading has been del'd Attys. for Plaintiff, Fulbright, Crooker, Freeman & Bates, Houston, Tex.

J. D. Dodson, Atty. for Def. 12/6/43.

STATE OF TEXAS,
COUNTY OF BEXAR:

J. D. Dodson, upon his oath, sayd that he is an agent of Defendant, The Texas Mexican Railway Company; that he has read the foregoing answer and that the allegations of fact therein contained that there was no consideration moving to said Defendant for the issuance of said instrument as a bill of lading contract of said Defendant to safely transport said shipment beyond its own line and to El Oro, Mexico and to thereby assume liability for negligence beyond its own line are true, and that he is authorized to make this affidavit.

J. D. Dodson.

Subscribed and sworn to before me, the undersigned authority, on this the 6 day of December, 1943.

Kathryn Connell, Notary Public, Bexar County, Texas. (Seal.)

[File endorsement omitted]

[fol. 28] IN THE DISTRICT COURT OF NUECES COUNTY

[Title omitted]

PLAINTIFF'S SECOND SUPPLEMENTAL PETITION—Filed March 13, 1944

Now comes plaintiff, Mexican Light & Power Company, Ltd., and in answer to defendant's fourth amended original answer, files this its Second Supplemental Petition and alleges:

I

1. Plaintiff specially excepts to the allegations of the second paragraph of the 7th Subdivision of sub-paragraph (f) of paragraph IV of said answer, appearing on page 13 thereof as follows:

"About September, 1936, Plaintiff filed its suit against the Pennsylvania Railroad Company in Philadelphia for

damages for the identical negligence for which Plaintiff seeks to hold this Defendant in this suit, and under oath there alleged that said Pennsylvania Railroad Company which issued the original bill of lading at Sharon, Pennsylvania, on September 20, 1934, was the initial carrier and as such was liable for the negligence which it is in this suit alleged this Defendant is liable for as initial carrier. Plaintiff unsuccessfully prosecuted to judgment this said suit against the Pennsylvania Railroad Company and now charges that this Defendant was in fact the initial carrier and must pay Plaintiff for the negligence of the Railways in Mexico."

for the reason that the assertions made by this plaintiff in said suit against Pennsylvania Railroad Company were assertions of law, or of the legal effect which this plaintiff contended attached to certain facts, and that the same does not constitute any admission against plaintiff in this case, and does not operate in any respect whatsoever as an [fol. 29] estoppel against plaintiff's assertion of its cause of action in this case; that said allegations quoted above are wholly irrelevant in this case, have no bearing whatsoever upon any issues in this case, and are designed and calculated to inflame and prejudice the minds of the jury in this case against the rights of the plaintiff herein, and of this its Special Exception No. 1 plaintiff prays judgment that the same be sustained and that said allegations be stricken in toto.

II

Waiving nothing and answering further if required, without waiving the foregoing special exceptions, this plaintiff denies all and singular the allegations of said answer and says that same are not true in whole or in part, demands strict proof thereof, and of this puts itself upon the country.

III

Waiving nothing and answering said answer further, if required, this plaintiff alleges that the suit brought by it against Pennsylvania Railroad Company, referred to in defendant's said answer, was predicated upon the legal contention that Pennsylvania Railroad Company was the initial carrier in the shipment of the property described in plaintiff's third amended original petition, to El Oro,

Mexico, under a bill of lading which plaintiff contended was in legal effect a "through" bill. The Court (being the District Court of the United States for the Eastern District of Pennsylvania) in that case held that said bill was merely a contract of carriage to Laredo, Texas, and not a through bill to some point in Mexico, and that the Privisions of 49 U. S. C., Sec. 20 (11), 49 U. S. C. A. Sec. 20 (11) were not applicable as against said Pennsylvania Railroad Company. Plaintiff here alleges that its said suit against Pennsylvania Railroad Company involved a construction of said statute, as does this suit, and that it had a legal right to prosecute said suit for the determination of its rights, as it has the legal right for determination thereof in this suit, and that [fol. 30] the holding of the court above referred to in said suit against the Pennsylvania Railroad Company and the matters and facts there alleged and involved have no legal effect in this case as an estoppel, or otherwise, except to the extent that said holding of the United States District Court for the Eastern District of Pennsylvania in said suit by plaintiff against Pennsylvania Railroad Company is legal authority supporting the position of plaintiff in this case that defendant herein is the initial carrier, under the provisions of said statute in the shipment referred to in plaintiff's third amended original petition of the property therein described.

Wherefore, plaintiff reiterates the prayer of its Third Amended Original Petition, and prays that it be given all of the relief therein prayed for.

Johns & McCampbell, Fulbright, Crooker, Freeman & Bates, Chas. W. Bell, Attorneys for Plaintiff, State National Bank Building, Houston, Texas.

[File endorsement omitted]

[fol. 31] In the District Court of Nueces County

[Title omitted]

Order Extending Term

This the 29th day of April, A. D. 1944, the Court being in the midst of the actual trial of the above entitled and numbered cause, and the time for the expiration of the term having arrived, and for such reason the undersigned Judge

presiding in the actual trial of such cause, deeming it expedient and to be necessary, it is ordered that the present term of the Court be, and it is hereby extended until the conclusion of such pending trial, for the purpose of completing such trial and for no other purpose.

This Order is approved and is shown in the Minutes before they are signed by me.

Tillman Smith, Judge Presiding, 117th District Court, Nueces County, Texas.

[fol. 32] IN THE 117TH DISTRICT COURT OF NUECES COUNTY, TEXAS

MEXICAN LIGHT & POWER COMPANY, LTD.

VS.

THE TEXAS MEXICAN RAILWAY COMPANY

JUDGMENT—April 4, 1945

On the 13th day of March, A. D. 1945, came on to be heard the above entitled and numbered cause, wherein Mexican Light & Power Company is *defendant*, in its regular order on the docket, and all parties, plaintiff and defendant, having appeared and announced ready for trial, and a jury having been expressly waived the case was tried to the Court without the intervention of a jury; and

All matters of fact having been stipulated and agreed to by the parties, as evidenced by the several written stipulations filed in the case; and the Court having heard and considered the oral arguments of the parties on March 13, 1944, and March 14, 1944, thereupon took the case under advisement on the said 14th day of March, 1944, for consideration upon written briefs thereafter filed by the respective parties; and

The Court having on April 29, 1944, duly extended the then existing term of the Court pending the trial of this cause until the conclusion thereof for the purpose of completing such trial; and

The Court, in the course of completing such trial, read and considered the pleadings, stipulations and briefs and being of the opinion that plaintiff should take nothing by its suit;

Therefore, Be It Rembered that on this the 4th day of April, 1945, it is Ordered, Adjudged and Decreed by the Court that Plaintiff, Mexican Light & Power Company, Ltd., take nothing and that defendant, The Texas Mexican Railway Company, recover of and from said plaintiff all costs, for which execution may issue, to each and all of which judgments, orders and actions of the Court plaintiff [fols. 33-34] then and there in open Court duly excepted and gave notice of appeal to the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas at San Antonio, Texas.

Tillman Smith, Judge.

Ordered entered: 4/4/45.

Approved as to form:

Johns and McCampbell Fulbright, Crooker, Freeman & Bates, Attorneys for Plaintiff.

J. D. Dodson, Marcellus G. Eckhardt, Attorneys for Defendant.

[fol. 35] Bond on Appeal for $1000.00. Approved and filed April 30, 1945. Omitted in Printing.

[fol. 36] In the 117th District Court, Nueces County, Texas

[Title omitted]

Request for Original Exhibits To Be Sent To Appellate Court—Filed May 16, 1945

To the Honorable Tillman Smith, Judge of Said Court:

Plaintiff, Mexican Light & Power Company, respectfully requests the Court to order the original Exhibits A, B and C attached to stipulations dated February 23, 1939, and original Exhibits A and B attached to stipulations dated August 13, 1942, together with such original stipulations to be sent to the Appellate Court in lieu of copies of such exhibits; that the court reporter include them under the same cover with the original of the statement of facts; and that such exhibits and stipulations be returned to this

Court after the final disposition of this case in the Appellate Courts.

Chas. W. Bell, John C. McCampbell, Attorneys for Mexican Light and Power Company.

[File endorsement omitted]

[fol. 37] In the District Court of Nueces County

[Title omitted]

Order as to Original Papers and Exhibits—May 16, 1945

It appearing to the Court that Plaintiff, Mexican Light and Power Company, has requested the Court to order the original Exhibits A, B and C attached to stipulations dated February 23, 1939, and original Exhibits A and B attached to stipulations dated August 13, 1942, together with such original stipulations to be sent to the Appellate Court in lieu of copies of such exhibits; that the court reporter include them under the same cover with the original of the statement of facts; and that such exhibits and stipulations be returned to this court after the final disposition of this case in the Appellate Court, and the Court being of the opinion that they should be so sent to the appellate court, it is accordingly so Ordered.

It is further ordered that such original exhibits and stipulations to which such exhibits are attached be returned to this Court after the final disposition of this case in the Appellate Courts.

Dated this the 16th day of May, 1945.

Tillman Smith, Judge Presiding.

[File endorsement omitted]

[fol. 38] In the District Court of Nueces County, Texas

[Title omitted]

Request for Transcript—Filed May 7, 1945

To the Clerk of Said Court:

We hereby request you to prepare a transcript under your hand and the seal of said Court for transmission to

the Court of Civil Appeals including a true copy of the following:

1. Plaintiff's Third Amended Original Petition.
2. Defendant's Fourth Amended Original Answer.
3. Plaintiff's Second Supplemental Petition in reply to Fourth Amended answer.
3a. Order extending term.
4. Judgment of District Court.
5. Order of the District Court authorizing the original stipulations and exhibits thereto to be sent up on appeal.
6. This request.
7. Appeal Bond.
8. Request to send up original Exhibits.
9. Order to Send Up Original Exhibits.
10. Certified bill of cost.

John S. McCampbell, Chas. W. Bell, Attorneys for Plaintiff.

[File endorsement omitted]

[fols. 39-41] Bill of Costs—Omitted in printing.

[fols. 42-45] Clerk's Certificate to Foregoing Transcript omitted in printing.

[fol. 46] IN THE DISTRICT COURT OF NUECES COUNTY

No. 15756-B

MEXICAN LIGHT & POWER COMPANY,

vs

THE TEXAS & MEXICAN RAILWAY COMPANY.

STATEMENT OF FACTS

APPEARANCES:

Johns & McCampbell, Esqs. Corpus Christi, Texas; Bigham, Englar, Jones & Houston, Eqs. New York; Fullbright, Crooker, Freeman & Bates, Esqs., Charles Bell, Esq., Houston, Texas, Attorneys for Plaintiff.

Kleberg, Eckhardt, Mobley & Roberts, Esqs., Corpus Christi, Tex., J. D. Dodson, Esq., San Antonio, Texas, Elmore H. Borchers, Esq., Laredo, Texas. Attorneys for Defendant.

Be It Remembered that on the 13th day of March, A. D. 1944, the above-numbered and entitled cause came on for hearing before the Honorable Tillman Smith, Judge of the 117th District Court, and plaintiff and defendant having announced ready for trial, the following proceedings were had, to-wit:

Counsel offered in evidence the following Five Stipulations, in their original forms, together with all exhibits and instruments attached thereto, said stipulations copied into this statement of facts and numbered in order Exhibit 1 to Exhibit 5 inclusive, and by order of the Court will be [fol. 47] forwarded in their original form together with all statements and exhibits that may be attached to said Stipulations, in their original form, to the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, at San Antonio, Texas, the said Five Stepulations, identified by the official Court Reporter respectively as Exhibit 1, Exhibit 2, Exhibit 3, Exhibit 4 and Exhibit 5, together with attached statements, copied into this Statement of Facts as follows, towit:

EXHIBIT I

IN THE DISTRICT COURT, 117TH JUDICIAL DISTRICT,

No. 15,756-B

MEXICAN LIGHT & POWER COMPANY, LTD. Plaintiff.

VS

THE TEXAS-MEXICAN RAILWAY COMPANY, Defendant

STIPULATION OF FACTS

IT IS HEREBY STIPULATED and AGREED by and between Mexican Light & Power Company, Ltd., plaintiff herein, and The Texas-Mexican Railway Company, defendant herein, acting by and through their respective attorneys of record, thereunto duly authorized, as follows:

1. The plaintiff at all times herein material was and now is a corporation duly organized and existing under and by virtue of the laws of the Dominion of Canada, having its principal office and place of business at 25 King Street West, Toronto 2, Ontario, Canada, and having an office [fol. 48] and place of business in Mexico City, Mexico, and engaged in the light and power business in Mexico.

2. The defendant at all times herein material was and now is a railway corporation duly organized and existing under the laws of the State of Texas, engaged in the business of a common carrier of goods for hire in interstate commerce and owning and operating a line of railroad only in the State of Texas between Corpus Christi, Alice and the International Boundary on the International Bridge at Laredo, Texas, and was not engaged in business in the Republic of Mexico.

3. If duly qualified representatives of the plaintiff were called as witnesses, they would testify that at all times herein material the plaintiff was and now is the owner of the shipment of goods referred to in the Third Amended Original Petition herein, more particulary described in Paragraphs VI and VII of said petition, and the party entitled to maintain this action.

4. On September 20, 1934, Westinghouse Electric & Manufacturing Company delivered to the Pennsylvania Railroad Company at Sharon, Pennsylvania, the shipment of merchandise described in Paragraphs VI and VII of the Third Amended Original Petition herein, which shipment was then in good order and condition and was destined to El Oro, Mexico, and said Pennsylvania Railroad Company issued to said Westinghouse Electric & Manufacturing Company a uniform straight bill of lading covering said shipment, a true copy of said bill of lading being attached hereto, marked "Exhibit A." The Pennsylvania Railroad [fol. 49] Company loaded said merchandise in freight cars P. R. R. 474425 and 425618 and in conjunction with its connecting carriers, Missouri-Kansas-Texas-Railroad Company and Southern Pacific Railroad Company, transported said shipment in said cars to Alice, Texas, where same was delivered to defendant, which transported said shipment in said cars over its line of railroad from Alice, Texas, to Laredo, Texas, at which latter point said shipment arrived on September 28, 1934.

5. The photostat hereto annexed, marked Exhibit B, is a true and complete copy of the instrument issued by and on behalf of defendant to Fausto Trevino at Laredo, Texas, on September 29, 1934.

6. At the time of the issuance by the defendant of the instrument referred to in Paragraph 5 of this stipulation, the shipment of goods covered by said instrument, which

consisted of the same goods described in Paragraph 4 hereof, was in the possession of the defendant in its freight yards at Laredo, Texas, in freight cars described as "P. R. R. 474425" and "P. R. R. 425618" and no exceptions were noted by the defendant as to the condition of said shipment at the time received by it at Alice, Texas, or at the time if issuance of said instrument at Laredo, Texas.

7. On September 29, 1934, the defendant transported the shipment referred to hereinbefore in said freight cars, P.R.R. 474425 and P. R. R. 425618 from Laredo, Texas, over its line of railroad to the International Boundary [fol. 50] Line on the International Bridge between Laredo, Texas, and Nuevo Laredo, Mexico, where said shipment in said freight cars was received by National Railways of Mexico for further transportation to El Oro, Mexico.

8. Attached hereto, marked Exhiibit "C", is a true copy of the petition or statement of claim filed by the plaintiff herein in the Court of Common Pleas No. 5 for the County of Philadelphia in the case entitled "Mexican Light & Power Company, Ltd., v. Pennsylvania Railroad Company, No. 4245"

9. Any tariffs, material and relevant, now in force or in the possession of the defendant will be produced by the defendant upon reasonable notice and may be introduced in evidence without certification.

10. Either party may use this agreement to prove any fact herein set forth, subject, however, to all legal objections not precluded by the terms of this stipulation.

Each party reserves the right to prove such other facts, as it may deem material.

In Witness Whereof, the parties to this suit have, by their attorneys, executed this agreement in duplicate on this the 23rd day of February, 1939.

Mexican Light & Power Company, Ltd., Johns, McCampbell & Snyder, by Fullbright, Crooker & Freeman. Its Attorneys of Record.

The Texas-Mexican Railway Company, by J. D. Dodson, Its Attorney of Record.

Here Follows 1 Photolithographs Side Folios 51-52

Exhibit A. to Exhibit I.

Exhibit A. to Exhibit I.

W. B. & M. Co. Form 1128-C.

(Uniform Domestic Straight Bill of Lading, adopted by Western, Southern and Western Classification Territories, March 15, 1922, as amended August 1, 1930.)

COPY

Exhibit A.

This Memorandum is for information only, and does not constitute a receipt for property or a contract for transportation. Shipper's No. 7-646

PENNA.R.R. Company Agent's No. 12410

RECEIVED, subject to the classifications and tariffs in effect on the date of the receipt by the carrier of the property described in the Original Bill of Lading,

at Sharon, Pa. 9-20-34 193 From Westinghouse Electric & Manufacturing Company

The property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned, and destined as indicated below, which said company (the word company being understood throughout this contract as meaning any person or corporation in possession of the property under the contract) agrees to carry to the usual place of delivery at said destination, if on its own road or its own water line, otherwise to deliver to another carrier on the route to said destination. It is agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions not prohibited by law, whether printed or written, herein contained, including the conditions on back hereof, which are hereby agreed to by the shipper and accepted for himself and his assigns.

Consigned to THE MEXICAN LIGHT & POWER CO.LTD.,C/O FAUSTO TREVINO,CUSTOMS AGENT, (MEXICAN RAILWAYS DE MEXICO, only)

Destination LAREDO State of TEXAS County of

Route PRR-MKT-SP-TM

Delivering Carrier. Car Initial PRR Car No. 474425 425618

No. Packages	DESCRIPTION OF ARTICLES, SPECIAL MARKS AND EXCEPTIONS	*WEIGHT (Subject to Correction)	CLASS OR RATE	Check Column
3	TRANSFORMERS	103250#		
	BLOCKING 1000#			
	PRR-425618 SURPLUS TO PRR-474425			
8	CRTS. TRANSFORMER PARTS	13720#		
2	BOXES TRANSFORMER PARTS	1310#		
	BLOCKING 1000#			
	FLAT CAR.			
	15'0" HIGH. 6'6" WIDE.			
	B.L.-879.			
	FOR EXPORT TO MEL ORO,ESTADO DE MEXICO VIA ACAMBARO VIA LAREDO			

Subject to Section 7 of conditions, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:
The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges.

(Signature of Consignor.)

If charges are to be prepaid, write or stamp here, "To be Prepaid."

PREPAID

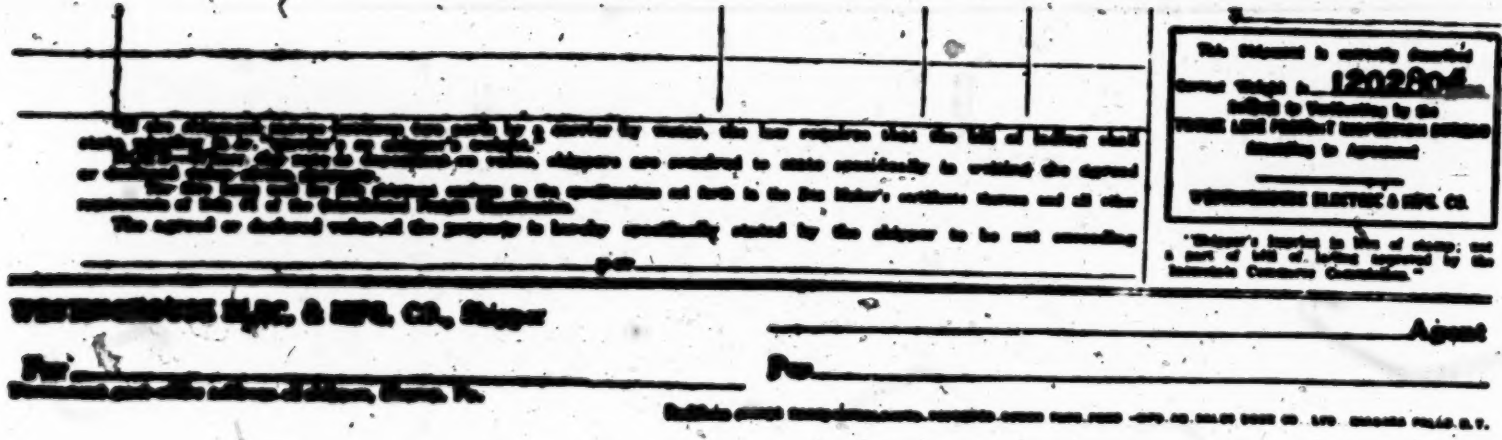
Received $ ... to apply in prepayment of the charges on the property described hereon.

(Agent or Cashier)

Per

(The signature here acknowledges only the amount prepaid.)

Charges Advanced



51-52

[fols. 53-54] Exhibit "B" to Exhibit 1 omitted, printed side page 9½ ante.

[fol. 55] EXHIBIT C

In the Court of Common Pleas No. 5 for the County of Philadelphia, September Term, 1936

MEXICAN LIGHT & POWER COMPANY, LTD., A Canadian Corporation,

v.

PENNSYLVANIA RAILROAD COMPANY, a corporation, Broad Street Station Building, Philadelphia, Pa.

No. 4245

PLAINTIFF'S STATEMENT OF CLAIM

Mexican Light & Power Company, Ltd., the above named plaintiff, claims the sum of $13,470.61 with interest thereon from October 13, 1936, from Pennsylvania Railroad Company, the above-named defendant, which sum is justly due and owing to plaintiff by defendant upon a cause of action whereof the following is a statement.

1. Plaintiff, Mexican Light & Power Company, Ltd., is a Canadian Corporation engaged in the electric light and power business in Mexico.

2. Defendant, Pennsylvania Railroad Company was at the times hereinafter mentioned and is now a railway corporation engaged in the business of operating a railway system as a common carrier of goods and passengers.

[fol. 56] 3. On September 20, 1934, the Westinghouse Electric and Manufacturing Company delivered to the defendant at Sharon, Pennsylvania, for transportation to El Oro, Mexico, certain goods and property of the plaintiff in three cases and ten crates, in good order and condition, to-wit:

3—4500 K. V. A. Single Phase, 50 Cycle, Outdoor Oil Immersed Water Cooled, Surge Proof Power Transformers, Primary 96,500/92,100/88, 100/85,750/83,

3—5955

700/81, 500 Volts, Secondary 3300-6600/3650-7300 Volts, the 81,500 Volt Tap may be made for "reduced capacity" but all other Primary and Secondary Taps shall have full K. V. A. capacity as per attached customers specifications.

1—Spare Primary Bushing.
1– Spare Secondary Bushing.
1—Set of Slings.
1—Spare set of Cork Gaskets for one Transformer.

4. Defendant by its duly authorized agent acting in the scope of his authority, executed, issued and delivered a uniform straight bill of lading, shipper's number 7-646, agent's number 12410, for carriage of the aforesaid goods from Sharon, Pennsylvania, to El Oro, Mexico.

[fol. 57] 5. The defendant was at the time of accepting the goods for shipment and is now conducting the business of a common carrier within the meaning of the Transportation Act of 1920, and was the initial carrier to whom said goods were delivered for transportation.

6. Thereafter the said goods were placed on defendant's freight cars for transportation to El Oro, Mexico; the ten crates of transformer parts on Pennsylvania Railroad car 425618, and the three transformers on Pennsylvania Railroad car number 474425.

7. While being transported to their destination, the cars containing the said goods were derailed on October 10, 1934, near Marvatio, Mexico.

8. As a result of the aforesaid derailment, plaintiff's goods were extensively damaged and rendered unserviceable to such an extent that it was necessary that the said transformers and equipment be returned to the factory of the Westinghouse Electric and Manufacturing Company at Sharon, Pennsylvania, for repairs and then reshipped to El Oro, Mexico.

9. As a result of the derailment the plaintiff was forced to expend the sum of $13,470.61 for repairs to its goods, freight charges back to Sharon, Pennsylvania, and then to El Oro, Mexico, and the necessary duties and customs charges. A true and correct statement of the charges in-
[fol. 58] curred in the repair and delivery of plaintiff's

goods is hereto attached, made a part hereof and marked Exhibit "A".

10. The damage to the plaintiff's goods and the aforesaid expenses were incurred as a result of the failure of the defendant, the initial carrier:

(a) To carry the said goods safely to their destination and deliver them in like good order and condition to the consignee;

(b) To fulfill the terms and conditions set forth in the bill of lading issued for the transportation of these goods;

(c) To carry out the obligations imposed upon it by the law upon the issuance of the said bill of lading.

Wherefore, plaintiff claims to recover from defendant the sum of $13,470.61, with interest thereon from October 13, 1936.

Conlen, LaBrum & Beechwood, Attorneys for Plaintiff.

COMMONWEALTH OF PENNSYLVANIA,
COUNTY OF PHILADELPHIA—SS:

J. Harry LaBrum, being duly sworn according to law, deposes and says that he is a member of the firm of Conlen, LaBrum & Beechwood, Esqs., correspondent attorneys for the plaintiff, Mexican Light and Power Company, Ltd., in the above suit; that he is informed, believes and therefore [fol. 59] avers that it has no office or officers within the United States; that he has read the foregoing statement of claim; that the facts stated therein have been obtained from correspondence and statements forwarded to him by Correspondent Attorneys and that they are true and correct to the best of his knowledge, information and belief, and that he expects to be able to prove the same at the trial of the case.

(Sgd.) J. Harry LaBrum.

Sworn to and subscribed before me this — day of February, A. D. 1937.

Statement of Charges that Originated in the Repairing of the Transformers that were damaged due to the Derailment of the Train that carried cars N M 12082, 12034, and 12009 near Maravatio.

	United States Dollars	Mexican Currency	Rebate Mexican Currency
1. For traveling expenses, freight on the testing apparatus and drying same, materials and freight, labor account laborers, carpenters, electricians, etc.		$ 2146.03	
2, Cost Consular fee	$ 1.00		
[fol. 60] 3. Freight charges and costs to Nuevo Laredo		3778.19	
Less Absenti tax			1200.00
Less excess on freight charges			27.64
4. Repairs on three (3) transformers per invoice	7498.00		
5. Cost of three (3) new coils per invoice	1524.00		
6. Freight charges return to Laredo	1126.85		
7. Return freight Laredo to Sharon	1186.25		
8. Freight Laredo to El Oro		2582.99	
9. Duties and custom charges		260.01	
10. Value of the copper lost on the coils			158.40
11. Expenses and fees	84.19		
	$ 11420.29	$ 8767.22	$ 1386.04

Exchange rate $1.00 U. S. = $3.60 dollars Mexican.

Recapitulation

$11,420.29 U. S. at $3.60 = 41113.04 dollars Mex.
Difference between $8767.22 Mex.
and refund 1386.04 Mex.

7381.18 dollars Mex.

48494.22 dollars Mex. or
$13470.61

EXHIBIT "A"

[fol. 61] EXHIBIT 2

IN THE DISTRICT COURT, 117TH JUDICIAL DISTRICT, NUECES COUNTY, TEXAS

No. 15,756-B

MEXICAN LIGHT & POWER COMPANY, LTD., Plaintiff,

vs.

THE TEXAS-MEXICAN RAILWAY COMPANY, Defendant

STIPULATION OF FACTS

It is hereby agreed and stipulated by and between the parties hereto, acting by and through their respective attorneys of record, thereunto duly authorized, as follows:

I

That when the shipment upon which this suit is founded was made, no through railroad tariff was in effect governing such shipment from either Sharon, Pennsylvania, or from Laredo, Texas, to either El Oro, Mexico, or to any other point in Mexico.

II

That all material published railroad tariffs in use by railroads in the United States governing the shipment upon which this suit is founded may be introduced in evidence without either party being required to have a certificate from the Secretary of Interstate Commerce Commission attesting the authenticity of the tariff.

[fol. 62]

III

That Fausto Trevino as agent did not pay to The Texas-Mexican Railway Company for carriage charges any other charges than those applicable from Sharon, Pennsylvania, to Laredo, Texas, which included placing the shipment at the international boundary line where it was delivered to the National Railways of Mexico.

IV

That the shipment upon which this suit is founded was not transferred from one car to another by The Texas-Mexican Railway Company at Laredo, Texas, but moved into Mexico on the same cars on which loaded at Sharon, Pennsylvania.

V

That plaintiff's witness, Ernest William Krause, if called to testify as a witness in behalf of plaintiff, would testify that he is an employee of the Westinghouse Electric & Manufacturing Company at Sharon, Pennsylvania, as an instructor in the large power transformer department. That during the period of March 3, 1925, to December 15, 1936, inclusive, he was employed as an inspector for the said company in the large power transformer department under the supervision of the Chief Inspector, W. J. Harrer. That in the month of February, 1935, he made a physical inspection, before and after disassembly, of 3–4500 KVA transformers identified by S. O. 70–KS–486, serial numbers 2020405, 2020406, 2020407. That he personally made [fol. 63] a report of such physical inspection written in longhand and addressed to Mr. W. J. Harrer, Chief Inspector, attention Mr. R. C. Wilson. That such inspection and report were made in the regular course of business, as a part of his duties, and such report is a part of said company's records. That said inspection was made only at Sharon, Pennsylvania, and that attached hereto and marked Exhibit "A" is a photostatic copy of said report above referred to, dated February 21, 1935, marked S. O. 70–KS–486, RMR 8863, referring to 3–4500 KVA transformers, serial numbers 2020405, 2020406 and 2020407, and that said photostatic copy is a true and correct copy of said report above referred to.

VI

That plaintiff's witness, Frank George Hohman, if called to testify as a witness in behalf of plaintiff, would testify that he is employed by the Westinghouse Electric & Manufacturing Company, at Sharon, Pennsylvania, as an inspector in the large power-transformer assembling department, and has been continuously employed in such activity since September 1, 1925. That during the period from September 1, 1925 to January 31, 1938, he served as inspector under the supervision of Chief Inspector, Mr. W. J. Harrer. That in the month of February, 1935, he made a physical inspection of 3–4500 KVA transformers, after disassembly thereof, identified by the numbers RMR 8863, SO 70–KS–486, serial numbers 2020405, 2020406 and 2020407. That he made a written report of such physical inspection in longhand and that the same is addressed [fol. 64] to Mr. W. J. Harrer, Inspector, attention Mr. R. C. Wilson. That such inspection and report were made in the regular course of business, as a part of his duties, and such report is a part of said company's records. That such inspection was made only at Sharon, Pennsylvania. That a photostatic copy of said report is attached hereto, and marked Exhibit B, dated February 14, 1935, marked RMR 8863, SO 70–KS–486, referring to 3–4500 KVA transformers, bearing serial numbers 2020405, 2020406 and 2020407, and that said photostatic copy is a true and correct copy of said original report above referred to.

VII

Either party may use this agreement, or any portion thereof, for the purpose of proving any facts herein set out or referred to, subject, however, to all legal objections not precluded by the terms of this stipulation.

VIII

Each party reserves the right to prove such other facts, if any, as it may deem material.

IX

This agreement and stipulation is not intended, nor is it to be construed as an agreement as to the legal effect of any of the matters or facts stipulated, but is intended as a

fact stipulation only, expressly made without prejudice to the right of either party hereto to assert its contentions as to the legal effect of such facts.

[fol. 65] In Witness Whereof the parties to this suit have by their attorneys executed this agreement in duplicate originals on this the 13th day of August, A. D. 1942.

Mexican Light & Power Company, Ltd., Plaintiff, by Fulbright, Crooker, Freeman & Bates, Its Attorneys of Record; The Texas-Mexican Railway Company, Defendant, by J. D. Dodson, Its Attorney of Record.

8/15/'42.

[Here follow 4 photolithographs, side folios 66-69.]

Exhibit A. to Exhibit 2.

Exhibit A.

Mr. W. L. Harrer. Chief Inspector

Plaintiff's Exhibit EWK #1.

att. Mr R. B. Wilson. S.O. 70KS426

CC to .. D. Robins.

.. .. .. H. G. Lawton. RMR 8863

3- 4500 KVA O.I.W.C. Transf I. 302762

Ser. 2020405- 6-7

2- H.V. Bushings. 1- case with details.

The above transf. were recd in crates, the bushings & details were in seperate cases.

Transf. Ser. 2020405 the upper end frame was badly bent, both feet bent & scored. all mtg materail destroyed.

Ser. 2020406 upper end frame slightly bent both feet bent & scored. All mtg material destroyed

Ser. 2020407 upper end frame badly bent Both feet bent & scored, mtg material destroyed except terminal board.

The porcelains were broken on the 2 HV bushings.
The following details were returned in case.
24 - tubes Dwg 53A756 item 25 with leads,
2 - of the tubes were broken. Replace 2 tubes.
3 - Sets mtg. material, all destroyed, except,
2 supports Dwg. 53A748 Item 4 4 Guides
and clamps Dwg. 53A748 Items 5-6-7 the fibre
studs were damaged.

Continued on sheet #2

Sheet 2.2 70K5426

3-H.V. leads, taping cut, otherwise O.K.

The transformers were dismantled the following material was found destroyed.

L. Spec. 302762A		Item	1	5	tubes
"	"	"	2	3	"
"	"	"	18	5	collars
"	"	"	29	6	Filler washers
"	"	"	30	5	" "
"	"	"	52	40	Spacing strips
"	"	"	10	12	Angle rings
"	"	"	11	12	" "
"	"	"	6	48	Spacing strips
"	"	"	14	12	Barriers
"	"	"	15	12	"
"	"	"	21	2	" and studs
"	"	"	26	6	Washers with spacers
Dwg.	45B92	Item	4	6	T.B. Barriers
"	"	"	5	12	T.B. "
"	53A747	"	16	6	T.B. Insulators
"	"	"	14	24	" "
"	"	"	15	24	" "

The coils were turned over to H.O. for further inspection

To put transformers in first class condition would recomend.

Replace all damaged & destroyed material.

Repair the 2 H.V. bushings

Supply 2 new upper end frames for 2 units

Supply all new felt gaskets and frames

Use covers for terminal side air C.T.

Retain 3 H.V. leads

Straighten lower end frames

E.M.K

Exhibit B. to Exhibit 2.

Exhibit B.

Mr. W. J. Hauser.
" R. C. Wilson
" D. B. Gibson
" H. E. Lawton

Joseph.

Plaintiffs Exhibit F.G.H. #1.

PMR 8863.
Ser 2020405-06-07
Eff 302762
SO 70MS486.

Tillamook Light & Pr Co.
3-4500 KVA. 8L Single phase transformers
Damaged in transit.

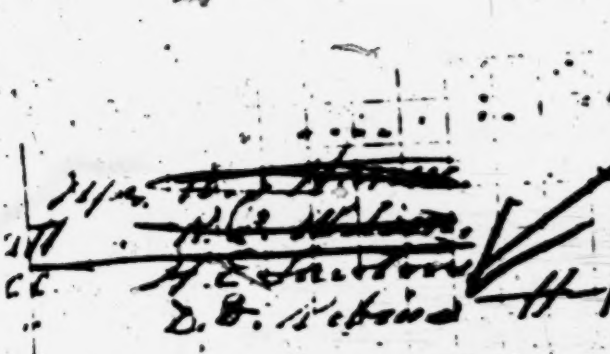
Ser # 2020405 Insulation cut on outer turn of HV coil #56. will be replaced. The HV terminals were broken, three SR washers between coils were damaged. (Right leg) Left leg 056 " " "
The terminal bolt and all collars are damaged on LV coil #11 will be replaced. Left leg. Terminal leads #4-5 on coils #15-16 were broken off. Tap #3 on coil 14 and Tap #7 on coil 17 " " both coils will be reaffixed. Also one outer turn of coils 10-17-27-29 were damaged and will be replaced. LV coil is not damaged on this leg.

Ser 2020406 - Right leg. HV coils #39-40-43-47-48 were damaged and will be replaced. LV coil on left leg HV coils #7-14-17-18 damaged and will be straightened LV coil OK
4 outside one turn coil spacers were broken 2 - 1/2" SR Washers damaged 1 - 1/2" SR washer and 056 SR washers were damaged.
HV terminal tubes of both legs were damaged

Serial # 2020407 Right leg.

Taps # 3 of H.V. coil #6 and Taps #7 coil #7 were
torn off and will be crafted, 10-052 SB gasket
were also damaged. mineta tube + all collars damaged
left leg. by coil at Tap will be replaced.
This column of coils were not damaged
Mineta tube was removed for inspection.
H.V. coil of this leg should not damaged.

Further Instructions to be furnished by Eng. Dept.



IMR 8863
4202-4606
El 50276
SE 70K5486

Inspection of Pr. Co.
2 - 4500 KVA S.A. dry type transformers
at the pumping station report of above
IMR

Material required to repair said coils as
above stated units.

Taps — Four HV coils #14 — One of each HV coils
" " " #14 #7-36-40-43-47-48
Coils — " " " #18
One " " #18

Heavy HV insulating Tubes
" ½" " "
" 3/16" " "
One hundred 4-56 " "
Eight — Micarta slow Tool shrunk
Heavy Hundred 2" coils ½" and 3/16" FB radial shrunk
Two LV insulating Tubes
Seven " Collars for top end of coils

Note
The LV Tubes must be made smaller on
outside diameter to accommodate
Height of this dimensions.

[fol. 70] EXHIBIT "C" to EXHIBIT 2 omitted. Printed side page 9½ Ante.

[fol. 71] EXHIBIT 3

IN THE DISTRICT COURT OF NUECES COUNTY, 117TH JUDICIAL DISTRICT OF TEXAS

No. 15,756-B

MEXICAN LIGHT & POWER COMPANY, LTD., Plaintiff,

vs.

TEXAS-MEXICAN RAILWAY COMPANY

It is agreed and stipulated by and between the parties that if Ernst Bohme, whose written deposition has heretofore been taken in this case, were called as a witness on the trial of this case he would if permitted testify that since the taking of his deposition on July 8, 1943, he has ascertained the quantities and weight of metals contained in the transformers and transformer parts described in plaintiff's petition; that he knows the actual value thereof on October 10, 1934, immediately subsequent to the alleged injury thereto; and that he would if permitted further testify that it is his opinion that the actual value of said transformers and transformer parts on October 10, 1934, immediately subsequent to the alleged injury thereto, was a sum not in excess of $3,320.00 United States currency.

This stipulation is without prejudice to, and expressly recognizes the right of defendant to interpose any legal objection available to said testimony and is without prejudice to any defense, factual or legal, available to the defendant.

[fol. 72] Executed this 23rd day of November, 1943.

Fulbright, Crooker, Freeman & Bates, Attorneys for Plaintiff; J. D. Dodson, Attorney for Defendant.

Exhibit 4

In the 117th District Court of Nueces County, Texas

No. 15756-B

Mexican Light & Power Company,

vs.

The Texas & Mexican Railway Company

4th Stipulation

In order to further facilitate the trial of this cause and to minimize the time required for the trial of it it is stipulated that the following facts are true:

1st

After the instrument sued upon by plaintiff and alleged to be abill of lading issued by the defendant was delivered to Fausto Trevino, as agent for plaintiff, he completed his arrangements with the Mexican customs office to permit importation of said shipment into Mexico—so notified the defendant and it thereupon placed said cars on the boundary line.

2nd

The defendant has not and had no agreement at the time it signed said instrument with the Mexican lines whereby the defendant received any portion of revenue from any traffic moving in Mexico, either north to the boundary line [fol. 73] or from the boundary line south.

3rd

Defendant received no portion of the revenue paid the Mexican lines for transporting the shipment in question from the boundary line south and defendant had no agreement to receive any portion of such revenue.

4th

The defendant has no agreement and had none at the time the shipment involved moved whereby it may recoup

or will be reimbursed for any damage it may pay for the negligence of the Mexican lines.

5th

The defendant received for its own use and benefit from the freight charges from Sharon, Pa. to Laredo, Texas, which were paid by plaintiff on the shipment in question a division of 15.02 per cent, which yielded to the defendant $248.70, as its compensation for transporting the shipment involved from Alice, Texas, to Laredo, Texas, and for delivering same at the International Boundary line between the United States of America and the Republic of Mexico; such freight charges having been based upon the export rate from Sharon, Pa., to Laredo, Texas; such export rate was slightly lower than the domestic rate and was applied because the Pennsylvania Railroad bill-of-lading, originally issued at Sharon, Pa., had indorsed on it "For Export."

[fol. 74]

6th

All of the property and equipment described in plaintiff's Third Amended Original Petition were damaged while in transit and in the custody of the National Railways of Mexico on its haul of same from the International Boundary Line between the United States of America and the Republic of Mexico to El Oro, Mexico, on the 10th day of October, 1934, by derailment and overturning of the flat cars upon which such property and equipment was being so transported.

7th

That the property and equipment described in plaintiff's Third Amended Original petition had no market value at El Oro, Mexico, or at the point in the Republic of Mexico at which it was damaged on the 10th day of October, 1934, either immediately before or immediately after the injury and damage thereto on said date; that the actual, reasonable value of said property and equipment at the point where it was damaged in the Republic of Mexico and at El Oro, Mexico, immediately before such injuries and damage thereto on the 10th day of October, 1934, was not less than $18,500.00, and that the actual, reasonable value thereof at the point where said property and equipment

was damaged in the Republic of Mexico and at El Oro, Mexico, immediately after said injuries on the 10th day of October, 1934, was not more than $3320.00.

[fol. 75] 8th

That in order to repair the property and equipment described in plaintiff's Third Amended Original petition and place the same in serviceable condition, it was necessary that said transformers and equipment be returned to the factory at Sharon, Pa., where they were manufactured and that the actual cost of returning said property and equipment to said factory a[illegible] repairing the same so as to place them in good, serviceable condition and returning same to El Oro, Mexico, the point of delivery, was the sum of $13,750.00, which plaintiff was compelled to pay and did pay and that the cost of said repairs and transportation was reasonable and necessary to place said transformers and equipment in good, serviceable condition and in the good condition in which they were prior to the injuries above referred to.

9th

In the event the plaintiff is entitled to a judgment in this case it is agreed that the judgment for the damages sustained on the date of the derailment is $13,750.00, together with interest and the costs, and in the event it be held that plaintiff is entitled to attorneys fees it is agreed that the Court fix that not to exceed $2500.00.

[fol. 76] 10th

That liability for the claim of damage made by plaintiff in this case was denied by defendant, and that it was necessary, in order for plaintiff to assert and preserve its claim against this defendant for this suit to be filed by plaintiff against defendant, in connection with the filing, preparation and prosecution of which it was necessary for plaintiff to employ the attorneys of record of plaintiff in this suit and to agree to pay them a reasonable attorneys fee for their services in connection with the filing, preparation and prosecution thereof.

11th

That plaintiff filed its notice of claim in writing and its claim in writing with the National Railways of Mexico on

October 12th, 1934, from which date continuously plaintiff, through its agents and attorneys remained in correspondence with the National Railways of Mexico, in reference thereto, until February 29th, 1936, on which date plaintiff's claims were rejected by the National Railways of Mexico, and that notice in writing and claim in writing were filed with the National Railways of Mexico prior to the expiration of nine months after the delivery of the property and equipment described in plaintiff's Third Amended Original Petition by the National Railways of Mexico and that this suit was instituted on the 10th day of October, 1936, in this Court. That defendant, on April 15, 1936, rejected the claim made by plaintiff upon it, cover-[fol. 77] ing the damage sought to be recovered in this suit. That plaintiff instituted a suit in 1936 against the Pennsylvania Railroad, in Pennsylvania, as initial carrier, and final judgment in such suit was rendered against plaintiff on April 13th, 1940. That the claim filed in writing with the National Railways of Mexico, above referred to, was sufficient in form to comply with the requirements of Section 2(b) of the instrument dated September 29th, 1934, issued by defendant to Fausto Trevino.

12th

At the time of the delivery by defendant at the International boundary line between the United States of America and the Republic of Mexico, of the property and equipment described in the plaintiff's Third Amended Original petition on flat cars of the Pennsylvania Railroad Company there existed an operating agreement or understanding between the defendant and the National Railways of Mexico that upon such delivery by defendant at said International boundary line the National Railways of Mexico would receive said property and equipment on said flat cars.

13th

This agreement and stipulation is cumulative of all other stipulations heretofore made and filed in this cause. All copies of instruments attached to any of the stipulations shall have the force and effect of originals. All stipulations made in this cause are not intended nor shall any of them be construed as an agreement as to the legal effect of

[fol. 78] any of the matters or facts stipulated. But the same are intended as stipulations of fact only.

In Witness Whereof the parties to this suit, by and through their attorneys of record, have executed this agreement in duplicate originals this 14th day of March, A. D. 1944.

Mexican Light & Power Company, Ltd., Plaintiff, by Johns & McCampbell, Fulbright, Crooker, Freeman & Bates, Chas W. Bell, Its Attorneys of Record; The Texas & Mexican Railway Company, Defendant, by J. D. Dodson, Marcellus Eckhardt, Elmore H. Borchers, Its Attorneys of Record.

[fol. 79] EXHIBIT 5:

IN THE DISTRICT COURT OF NUECES COUNTY, TEXAS, 117TH JUDICIAL DISTRICT.

No. 15756-B

MEXICAN LIGHT & POWER COMPANY, LTD.

vs

THE TEXAS MEXICAN RAILWAY COMPANY.

STATEMENT OF THE TESTIMONY OF WITNESSES OF DEFENDANT, THE TEXAS MEXICAN RAILWAY COMPANY.

It is agreed that witness of The Texas Mexican Railway Company, Defendant, if called by Defendant to testify, will give the following testimony:

1. That the National Railways of Mexico, prior to 1914, owned the capital stock of The Texas Mexican Railway Company.

2. In the year 1914, under a requirement of the Texas Railroad Commission, 7 of the 25,000 shares of capital stock of The Texas Mexican Railway Company were sold to citizens of Texas, which citizens, after acquiring such stock, became the directors of The Texas Mexican Railway Company for its operation, wholly independent from the influence or control of the National Railways of Mexico, each of such directors owning one share of said stock.

3. Since 1914, The Texas Mexican Railway Company has been so conducted by such independent directors residing in Texas.

[fol. 80] 4. The total issued capital stock of The Texas Mexican Railway Company has been and is 25,000, shares; 24,950 shares of said stock have been for more than twenty years issued to and held by the Trustee for the holders of bonds issued by the National Railways of Mexico which were required to be further secured by said 24,950 shares of capital stock of The Texas Mexican Railway Company.

5. That the said Trustee votes said stock, but the Texas Mexican Railway Company is operated, managed and controlled independently by its board of seven directors, each of whom resides in Texas and owns one share of stock. There are 43 shares of stock of The Texas Mexican Railway Company the ownership of which has not been located for many years, and is not now known.

The foregoing may be considered as testimony given by competent witnesses of the Defendant, The Texas Mexican Railway Company, and introduced just as if the same had been testified to by such witnesses competent to give such testimony from the records of the Company. Plaintiff reserves the right to object to the materiality of this testimony, though it does not question the competency of the witnesses giving the same, nor that it is not a true reflection of the records of The Texas Mexican Railway Company.

J. D. Dodson, E. H. Borchers, M. G. Eckhardt, Attorneys for Defendant, The Texas Mexican Railway Company.

[fol. 81] Johns & McCampbell, Fulbright, Crooker, Freeman & Bates, Chas. W. Bell, Attorneys for Plaintiff, Mexican Light and Power Company, Ltd.

Accepted as a part of the record in the above styled and numbered cause, and filed therein with the approval of this Court.

Tillman Smith, Judge Presiding.

[fol. 82] [Reporter's Certificate to foregoing Statement of Facts omitted in printing]

AGREEMENT TO RECORD

THE STATE OF TEXAS,
County of Nueces.

We, the attorneys respectively for the plaintiff and the defendant in Cause No. 15756-B, entitled Mexican Light & Power Company vs The Texas & Mexican Railway Company, hereby agree that the above and foregoing 27 pages contain and constitute a full, true and correct transcript, [fol. 83-84] in question and answer form, of all the evidence introduced upon the trial of this cause and of all the proceedings had in connection therewith and that the same may be filed among the papers of this cause as the statement of facts.

Fulbright, Crooker, Freeman & Bates, Chas W. Bell,
Johns & McCampbell, Attorneys for the Plaintiff,
J. D. Dodson, E. H. Borchers, M. G. Eckhardt,
Attorneys for the Defendant.

[fol. 85] IN THE COURT OF CIVIL APPEALS OF TEXAS

No. 11544

MEXICAN LIGHT & POWER COMPANY, Ltd., Appellant,

v.

THE TEXAS-MEXICAN RAILWAY COMPANY, Appellee.

OPINION—Oct. 31, 1945.

This is an appeal from a judgment denying a shipper a recovery for damages suffered by it as a result of the derailment of certain freight cars upon which its property was being transported within the Republic of Mexico, over the lines of National Railways of Mexico. The asserted liability of appellee, The Texas-Mexican Railway Company, is predicated upon the provisions of 49 U.S.C.A. § 20, (11),[1]

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[1] "Any common carrier, rai' oad, or transportation company subject to the provisions of this chapter receiving property for transportation from a point in one State or Territory or the District of Columbia to a point in another State, Territory, District of Columbia, or from any point

[fol. 86] in that appellant, Mexican Light & Power Company, Ltd., contends that appellee issued to it a *through bill of lading* covering the shipment from a point in the United States (Laredo, Texas) to a point in an adjacent foreign country (El Oro, Mexico).

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in the United States to a point in an adjacent foreign country shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever shall exempt such common carrier, railroad or transportation company from the liability hereby imposed; and any such common carrier, railroad, or transportation company so receiving property for transportation from a point in one State, Territory, or the District of Columbia to a point in another State or Territory, or from a point in a State or Territory to a point in the District of Columbia, or from any point in the United States to a point in an adjacent foreign country, or for transportation wholly within a Territory, or any common carrier, railroad or transportation company delivering said property so received and transported shall be liable to the lawful holder of said receipt or bill of lading or to any party entitled to recover thereon, whether such receipt or bill of lading has been issued or not, for the full actual loss, damage, or injury to such property caused by it or by any such common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is hereby declared to be unlawful and void. * * *"

The controlling question in this litigation is stated by appellee, substantially, as follows:

Did the instrument sued upon (which was issued by The Texas-Mexican Railway Company) disclose an enforcible through bill of lading upon which to hold appellee liable for damages arising from the negligence occurring within the Republic of Mexico while the property was being transported by the National Railways of Mexico?

This case was tried below upon the stipulations of the parties. From the facts so stipulated no conflicting fact inferences can be drawn. Questions of law only are presented.

On September 20, 1934, Westinghouse Electric and Manufacturing Company delivered three specially built electric transformers and parts to the Pennsylvania Railroad Company for shipment to Laredo, Texas. This equipment had been purchased by appellant and in the bill of lading issued by the Pennsylvania Railroad Company, said property was consigned to the Mexican Light & Power Company in care of Fausto Trevino, Customs Agent at Laredo, Texas. These transformers, etc., were loaded upon two Pennsylvania flat cars and transported over the lines of the Pennsylvania Railroad Company, Missouri-Kansas and Texas Ry. Co., Southern Pacific Lines, and The Texas-Mexican Railway Company to the freight yards of the latter railway company at Laredo, Texas.

While the cars loaded with appellant's property were waiting in the freight yards of the appellee at Laredo, said railway company issued to Fausto Trevino, appellant's agent, the document sued upon in this action. This instrument is dated September 29, 1934, and by it The Texas-Mexican Railway Company acknowledged receipt of the electrical equipment here involved, and agreed "to carry (the property received) to its usual place of delivery at said destination, if on its own road or its own water line, [fol. 87] otherwise to deliver to another carrier on the route to said destination."

The shipment was consigned to Mexican Light & Power Company, Ltd., destination, El Oro, State of Mexico; route, via Acambaro.

The disputed instrument was made out upon a form prepared for a domestic straight bill of lading. The receipt clause states that the property to be shipped is "Received subject to the classifications and tariffs in effect on the

date of the issue of this Bill of Lading." No rates or charges for carriage are set forth in the instrument which does, however, contain the following direction, set forth over the name of the consignor, Fausto Trevino, viz: "The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges."

After the instrument above described had been issued and delivered, the appellee moved the cars laden with appellant's property from its yards in Laredo to the middle of the International Bridge over the Rio Grande. Here the cars were picked up by the Mexican carrier and transported to the interior of Mexico, where a derailment occurred with resultant damage to appellant's property. This damage occurred on October 10, 1934.

Appellant made claim for damages against the Mexican carrier, which was rejected. Suits were then filed against the Pennsylvania Railroad Company and The Texas-Mexican Railway Company, upon the apparently alternative theories, (1) that the Pennsylvania was an initial carrier, under the Sharon bill of lading and (2) that The Texas-Mexican Railway Company was the initial carrier under the Laredo bill of lading.

The action against the Pennsylvania was tried first and resulted in a judgment in favor of the carrier. Mexican Light & Power Company v. Pennsylvania R. Co. (District Court, Eastern District of Pa.) 33 Fed. Supp. 483.

[fol. 88] The federal district court held that the Sharon bill of lading issued by the Pennsylvania was not a through bill of lading to El Oro, Mexico, although it contained the notation, "For export to: El Oro, Estado de Mexico, via Acambaro, via Laredo." The court further held that under the Carmack Amendment, as amended by the first Cummings Amendment, a carrier receiving property at a point within the United States for shipment to a point within an adjacent foreign country was not required by law to issue a "through bill of lading." (For a statement of the history of the Carmack Amendment and various amendments thereto, see Ann. 49 U. S. C. A. § 20, (11), p. 89; also Alwine v. Pennsylvania R. Co. —— Pa. ——, 15 Atl. 2d 507.)

Under the above holding, it is apparent that the Texas-Mexican Ry. Co. was under no legal obligation to issue a through bill to El Oro, Mexico. It appears from the stipulations that the proportionate part of the export freight

rates charged and paid by appellant under the Sharon bill of lading was in payment for transportation to the international boundary line. Appellee could have taken a receipt for the property at this point and not issued a bill of lading calling for further shipment to a point within an adjacent foreign country over the lines of a foreign connecting carrier.

However, appellee did not choose to follow this seemingly permissible procedure. It issued an instrument which purports to be a through bill of lading and which clearly imports an obligation on the part of appellant to pay charges for transporting its property to El Oro, Mexico. It further appears that freight charges (for transportation in Mexico) were actually paid, although appellee received no part of them. In fact, appellee having been paid for transportation to the international boundary line, could not lawfully receive an additional sum of money for transporting the property from its yards in Laredo to said boundary line, in view of the rules and regulations of the Interstate Commerce Commission relating to the establishment of uniform rates.

[fol. 89] This, however, does not mean that the Laredo bill of lading was issued without a legal consideration. The shipment was moved by appellee from its Laredo yards to the international boundary line and for this service appellee was paid by appellant. This is true whether it be considered that service was rendered under one or more of the bills of lading involved in transporting the property from Sharon, Pennsylvania, to El Oro, Mexico. Further, a through bill of lading, in the light of the Carmack and Cummings Amendments, represents one contract and must be regarded as a unit and not as a series of contracts between a shipper and a number of carriers in considering tort liability for damages sustained in the course of transportation. A connecting carrier is regarded as the agent of the initial carrier, regardless of the actual contractual relationship existing between the two. Here the bill of lading issued by appellee was accepted by appellant, or its agent, as and for a contract for shipment through to El Oro, Mexico. No contract of carriage was entered into between the appellant and the Mexican carrier, and none was necessary by reason of the method adopted by appellant and appellee in effecting arrangements for further transportation of appellant's property to its ultimate destination in Mexico.

We hold that the Texas-Mexican Railway Company was the initial carrier under a through bill of lading which was supported by a valuable consideration. Barrett v. Northern Pac. Ry. Co. —— Idaho ——, 157 Pac. 1016; Rice v. Oregon Short Line Ry. Co., —— Idaho ——, 198 Pac. 161; Louisville and Nashville Ry. Co. v. Johnson, —— Ky. ——, 206 S. W. 638.

Appellee also contends that the Laredo bill of lading was absolutely void, in that it violated the provisions of 49 U. S. C. A. § 6, (1), (4), (5) and (7), which relate to the fixing and publication of rates, fares and charges for transportation and the fixing of uniform charges and rates. It was stipulated in the court below, "that when the shipment upon which this suit is founded was made, no through railroad tariff was in effect governing such shipment from either Sharon, Pennsylvania, or from Laredo, Texas, to [fol. 90] either El Oro, Mexico, or any other point in Mexico."

The Interstate Commerce Commission has no authority to establish rates or supervize method of fixing and publicizing rates without the limits of the territorial jurisdiction of the United States. 49 U. S. C. A., § 1 (2). It has been held that the Interstate Commerce Act neither authorizes nor forbids the making of joint, through international rates. Goldberg v. Delaware, L. & W. R. Co., 40 N. Y. Supp. 2d 44, and we do not understand that the establishment of a through rate to a point in an adjacent foreign country is a necessary prerequisite to the issuance of a legal and binding through bill of lading to such point. To so hold would go far toward defeating the obvious purpose of Congress in extending in part the provisions of the Carmack Amendment to shipments from a point in the United States to a point in an adjacent foreign country, as was done by the Cummings Amendment. The record before us does not disclose that an illegal or unauthorized rate was in any way involved.

However that may be, it has been held as well settled law that the fact that the contract of carriage was based upon an illegal or discriminatory rate does not render the contract absolutely void, so that liability for tort could not be predicated upon it under the provisions of the Interstate Commerce Act. Adams Express Co. v. Darden (Sixth Cir. Ct. of App.) 286 Fed. 61. In Judge v. Northern Pac. Ry. Co., (Cir. Ct. Ore.) 189 Fed. 1014, it was said that, "The

Interstate Commerce Commission forbids rebates, special rates, preferences, etc., and makes all agreements in reference thereto void, but it does not make the contract of affreightment otherwise void, and there is nothing in the law which will excuse the carrier from liability when it has accepted property for transportation under such a contract."

Cases which involve the validity of rates and charges incident to transportation are clearly distinguishable from those in which damages for negligent carriage are involved. [fol. 91] We hold that the provisions of the Interstate Commerce Act do not, under the facts of this case, prohibit the fixing of liability upon appellee as the initial carrier under the through bill of lading issued by it.

We do not regard the issuance of a through bill of lading to a point in an adjacent foreign country as being without the corporate powers of the appellee, which is a Texas railway corporation. Initial carrier liability for the negligence of a connecting carrier is not something which appellee in so many words assumed by contract provision, but is a liability which was imposed by Congress in the exercise of its power to regulate interstate and foreign commerce.

It was stipulated below that appellee "has no agreement and had none at the time the shipment moved, whereby it may recoup or will be reimbursed for any damage it may pay for negligence on the Mexican lines." The agreement between appellee and National Railways of Mexico was a general understanding that upon delivery by appellee at the International Boundary Line, the National Railways of Mexico would receive said property and equipment.

It was likewise stipulated that 24,950 shares out of 25,000 shares of the capital stock of the Texas-Mexican Railway were held by the trustee for the holders of the bonds issued by the National Railways of Mexico as security for the payment of said bonds.

As we view the case, the liability of the initial carrier under the Interstate Commerce Act is in no way dependent upon agreements between the initial carrier and the connecting carrier. Nor does it depend upon the inter-corporate relationship of two carriers. These matters are immaterial.

We are of the opinion that, under the terms of the first Cummings Amendment to the Carmack Amendment, the Texas-Mexican Railway Company is liable to appellant for

the amount of damages, sustained by it as fixed by stipulation of the parties. It, therefore, becomes our duty to render such judgment as should have been rendered by the trial court. Rule 434, R. C. P.

[fols. 92-93] The judgment appealed from is reversed and judgment here rendered that appellant do have and recover from appellee the sum of $13,750.00, together with interest on said amount from October 10, 1934, until paid, at the rate of six per cent per annum and all costs of suit.

Reversed and rendered.

James R. Norvell, Associate Justice.

Opinion delivered and filed October 31, 1945.

[fol. 94] In the Court of Civil Appeals of Texas

No. 11544

Mexican Light & Power Company, Ltd., Appellant,

vs.

The Texas-Mexican Railway Co., Appellee

From the 117th District Court of Nueces County

Judgment—October 31, 1945

This cause came on to be heard on the transcript of the record, and the same being examined, because it is the opinion of the Court that there was error in the judgment of the Court below in rendering judgment in favor of the Texas-Mexican Railway Company, appellee, as against the appellant, Mexican Light & Power Company, Ltd., it is therefore considered, adjudged and ordered that said judgment be, and it is hereby, reversed, and judgment here rendered that should have been rendered by the Court below.

It is therefore ordered, adjudged and decreed that appellant, Mexican Light & Power Company, Ltd., do have and recover of and from appellee, The Texas-Mexican Railway Company, the sum of $13,750.00, together with interest thereon from October 10, 1934, until paid, at the rate of six per cent per annum.

It is further ordered that appellee, the Texas-Mexican Railway Company, pay all costs in this Court and the court below, in this behalf expended and incurred, and this decision be certified below for observance.

[fol. 95] In the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, at San Antonio

[Title omitted.]

Motion for Rehearing—Filed November 14, 1945

Now comes The Texas Mexican Railway Company, Appellee in the above styled and numbered cause, and files this its Motion for Rehearing, and for the errors hereinafter set forth respectfully moves the Court to in all things set aside the opinion of the Court delivered and filed October 31, 1945, and the judgment ordered entered thereon, award a rehearing, and upon rehearing affirm the judgment of the Trial Court, because:

1. The Court erred in holding as matter of law that under the stipulations as made the instrument sued upon was a thru bill of lading, and in thereupon reversing the judgment of the Trial Court, for this:

(a) Each stipulation clearly bespoke that it did not waive or prejudice any pleading, or fact not stipulated or not contrary to one stipulated, and the inference from stipulated and undisputed facts clearly sustains the affirmative pleading that said instrument was not intended nor understood by either party to be a thru bill of lading, which this Court should have presumed to have been found in support of the [fol. 96] judgment since such finding was not attacked by any assignment of error.

(b) The stipulations made and the undisputed facts support the finding that the instrument alleged to be a thru bill of lading was wholly without consideration, which this Court should have presumed to have been found in support of the judgment since that defense was affirmatively pleaded and such finding was not attacked by any assignment of error.

Authority in Support of (a) and (b)

Mathews et al. v. Looney et al., 100 S. W. (2d) 1061.

(c) The stipulations made and the undisputed facts establish that no thru rate from Laredo, Texas, to any Mexican point existed or was made, and no tariffs to govern were authorized or published, which fully supported the affirmative pleading that Sec. 6, Par. 1, Title 49 U. S. C. A., forbade Appellee to engage upon the transportation under a thru bill of lading under Sec. 6, Par. 7, Title 49 U. S. C. A., and the Court erroneously refused to give such construction to said statute by holding that Appellee had the power to issue a legal and binding thru bill of lading to Mexico without having established or made any rate or published any tariff to govern the transportation.

(d) The stipulations made and the undisputed facts establish complete absence of contractual relations of any sort between Appellee and the Mexican Lines with respect to thru contracts for carriage from Laredo to Mexico and negative application of the doctrine of agency between Appellee and the Mexican Lines.

2. The Court erred in holding the instrument sued upon as a thru bill of lading was supported by a valuable consideration, and in thereupon reversing the judgment of the Trial Court, for this:

(a) The stipulated and undisputed facts affirmatively establish that neither Appellant nor its agent paid or promised anything in consideration for said instrument as a thru bill of lading or otherwise, and that Appellee received nothing as consideration for its services except its proportion of the special export rate from Sharon, Pa. to the international boundary line where delivery was required by the [fol. 97] Sharon bill of lading to be made by Appellee, and its proportion so received was full compensation under the Sharon bill of lading for all services by Appellee in transporting the shipment from Alice, Texas to the international boundary line.

(b) The stipulated and undisputed facts affirmatively establish that Appellee had no agreement to and did not share in any freight charges paid for transportation in Mexico.

(c) There is no evidence or pleading of the existence of any rate from the yards in Laredo to the international boundary line applicable to the instrument sued upon, nor that the Sharon bill of lading was discharged prior to delivery by Appellee at the terminus of its rails at the international boundary line.

3. The Court erred in holding that establishment of a thru rate from a point in the United States to a point in an adjacent foreign country is not a necessary prerequisite to issuance of a valid thru bill of lading between such points, and in thereupon reversing the judgment of the Trial Court, for this:

(a) Sec. 1, Par. 2, 49 U. S. C. A., expressly reserves full jurisdiction over all commerce by rail between points in the United States and an adjacent foreign country, "so far as such transportation * * * takes place within the United States," and the holding by the Court essentially rests upon an erroneous construction to the effect that said Sec. 1, Par. 2, does not apply to transportation from a point in the United States destined to a point in an adjacent foreign country in so far as the transportation takes place within the United States, nor to domestic carriers and their contracts made with respect to such transportation in the United States, except as to initial carrier liability under Sec. 20, Par. 11, Title 49 U. S. C. A.

(b) The clear express provision of Sec. 6, Par. 7, 49 U. S. C. A. makes it condition precedent to a carrier engaging upon any character of transportation, interstate or foreign, in so far as it takes place within the United States, to comply with Sec. 6, Par. 1, 49 U. S. C. A., and the holding by the Court essentially rests upon an erroneous construction to the effect that said Sec. 6, Pars 1 and 7, do not apply to transportation from a point in the United [fol. 98] States destined to a point in an adjacent foreign country in so far as t transportation takes place within the United States, nor to domestic carriers and their contracts made with respect to such transportation in the United States.

(c) Sec. 20, Par. 11, 49 U. S. C. A. makes the issuance of a thru bill of lading covering transportation from a point in the United States to a point in an adjacent foreign country a condition precedent to initial carrier liability upon

the domestic carrier and the thru bill of lading contemplated and intended presupposed being supported by a thru rate, and said holding rests upon an erroneous construction of said Sec. 20, Par. 11 to the contrary.

4. The Court erred in holding that initial carrier liability under the Interstate Commerce Act (Sec. 20, Par. 11, 49 U. S. C. A.) is in no way dependent upon agreements between the initial carrier and the connecting carrier, and in thereupon reversing the judgment of the Trial Court, for this:

(a) The sole theory upon which initial carrier liability created by Sec. 20, Par. 11, 49 U. S. C. A., may be sustained is that of agency between carriers of domestic shipments made upon thru rates and bills of lading which said carriers are required by statutes to provide for; and arising out of shipments transported from points within the United States to points in adjacent foreign countries where thru bills of lading are voluntarily issued by domestic carriers, which issuance presupposes mutuality of agreement between the domestic and foreign carriers involved with respect to the thru bill of lading contract, and in each instance liability under said statute is grounded upon the legal doctrine that carriers participating in the thru rate and contract are the agents for the other with respect to said transportation, for without agency between the respective carriers, there is no basis in our law upon which one carrier may be made responsible for the tort of another and without mutuality or contractual arrangements between the carriers participating in the thru bill of lading contract and transportation there is no basis in our law upon which to raise agency.

5. The Court erred in reversing and rendering the judgmnet of the Trial Court in reliance upon authorities cited by Appellant which sustain the proposition that liability for tort may be maintained with respect to interstate ship-
[fol. 99] ments tainted with rebates and preferences, for the reason in no case cited, to-wit, Barrett v. No. Pac., 157 Pac. 1016; Rice v. Oregon Short Line, 198 Pac. 161; L. & N. v. Johnson, 206 S. W. 638; Goldberg v. Delaware Co., 40 N. Y. S. (2d) 44; Adams Express Co. v. Darden, 286 Fed. 61; Judge v. Northern Ry., 189 Fed. 1014, was the transportation engaged upon without tariffs having been pub-

lished and rates made in compliance with Sec. 6, Pars. 1, 4 and 5, 49 U. S. C. A., and all of which were domestic shipments with respect to which initial carrier liability under express provisions of Sec. 20, Par. 11, U. S. C. A., arises without issuance of a bill of lading; whereas, with respect to shipments to a foreign country by the express language of the same statute initial carrier liability arises only upon issuance of a thru bill of lading and the Court apparently overlooked the cases cited in the brief for Appellee, to-wit, Chicago & Alden v. Kirby, 225 U. S. 155, 32 S. C. R. 648; So. Ry. v. Reid, 222 U. S. 424, 32 S. C. R. 140; Stevens v. A. T. & S. F., 202 N. Y. S. 195 (certiorari denied 267 U. S. 603, 45 S. C. R. 463), each of which holds, and we have found no case to the contrary, that the provisions of Sec. 6, Pars. 1, and 7, 49 U. S. C. A., are mandatory with respect to shipments within the limits of the United States, and Hamlen & Sons v. I. C., 212 Fed. 324, which follows and applies said mandatory holding to a contract for shipment from a point within the United States to a foreign country, the Court thereby controlling and disposing of this case upon authority of decisions with respect to controversies arising out of transportation wholly within the United States where Sec. 6, Par. 1, 49 U. S. C. A. had been complied with and liability for the tort arose irrespective of the issuance of the bill of lading notwithstanding here no liability was created by the statute, except upon the issuance of a thru bill of lading voluntarily issued and no rates had been made nor tariffs published upon which the transportation could be engaged upon because of the prohibition of Sec. 6, Pars. 1 and 7, 49 U. S. C. A.

[fol. 100] 6. The Court erred in holding and in thereupon reversing the judgment of the Trial Court that because a shipment in interstate commerce lawfully engaged upon, but violating the statutes forbidding rebates and discrimination, will sustain causes of action based upon negligence of the carrier under Sec. 20, Par. 11, 49 U. S. C. A., that the action of negligence here may be sustained under said statute, notwithstanding said holding rests upon facts which disclose that the transportation, if intended as thru commerce, was not lawfully engaged upon, for this:

(a) No statute denouncing rebating or discrimination has declared that violation thereof of itself denounces the engagement for the transportation, while Sec. 20, Par. 11,

49 U. S. C. A. with respect to this shipment conditions it solely upon voluntary issuance by Appellee of a thru bill of lading from Laredo to El Oro, which the instrument sued upon is alleged to be, and the undisputed record shows that the plain provisions of Section 6, Par. 1, 49 U. S. C. A. were never complied with, and for that reason Par. 7 of said section forbade power to engage upon the transportation, and no legal thru bill of lading may exist to transport that transportation of which may not be engaged upon by law.

7. The Court erred in holding the statute imposed initial carrier liability upon Appellee, and in thereupon reversing and rendering the judgment of the Trial Court, for this:

(a) Such ruling essentially depends upon the erroneous construction of Sec. 20, Par. 11, 49 U. S. C. A. to impose liability upon a domestic carrier for foreign negligence notwithstanding (1) there was no consideration received or promised for the instrument relied upon as a thru bill of lading; (2) no rate was made or existed and no tariff was published to support a thru bill of lading governing that portion of the transportation which took place in the United States; (3) the parties to the instrument did not intend or understand it to be a thru bill of lading at the time it was executed and delivered, and it plainly negatives on its face assumption of any liability beyond the line of the domestic carrier.

[fol. 101] 7-A. The Court erred as matter of law in holding that The Texas Mexican Railway Company was the initial carrier in a thru bill of lading, and in thereupon reversing and rendering the judgment of the Trial Court, for this:

(a) The instrument sued upon plainly negatives from its face a voluntary thru bill of lading or contract of Appellee to transport the shipment from Laredo to El Oro, Mexico for this: Appellee was under no duty to execute such bill of lading or contract. No law forbade it expressly stipulating against any obligation to transport the shipment in question beyond its own line. Its line terminated at the international boundary line. The instrument says that the shipment is consigned to Appellant and destination is El Oro, Mexico. The language of the in-

strument with respect to transportation is that Appellee "agrees to carry to its usual place of delivery at said destination, if on its own road or its own water line, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed * * * that every service to be performed hereunder shall be subject to all the conditions not prohibited by law, whether written or printed, * * * herein contained." El Oro was not on the line of Appellee. Its line terminated at the international boundary line where its rails contact those of the Mexican Lines. The shipment was safely transported to that terminus. It was there delivered to another carrier on the route to El Oro. The condition that Appellee was not obligated to transport beyond its own line was prohibited by law with respect to interstate shipments, but not with respect to a shipment from Laredo destined to El Oro, Mexico. The condition was not forbidden at common law. The express stipulation against any obligation to transport beyond its own line was, therefore, a vital part of the contract and utterly destructive of any fair ground upon which to contend that it does not negative any intention or understanding of either party that by the instrument Appellee was contracting to transport beyond its own line and thereby became liable for the negligence of the Mexican Lines.

[fol. 102] 8. The Court erred in finding, essential to its judgment reversing that of the Trial Court, that Appellant or its agent accepted the instrument sued on "as and for a contract for shipment through to El Oro, Mexico," for there is no pleading nor stipulation nor evidence to that effect, and it is repugnant to the finding by the Trial Court in support of the judgment to the contrary.

9. The Court erred in finding, essential to its judgment reversing that of the Trial Court, that "no contract of carriage was entered into between the Appellant and the Mexican carrier," for there is no pleading nor stipulation nor evidence to sustain said finding and the burden to establish that Appellee issued a thru bill of lading essential to its recovery under Sec. 20, Par. 11, 49 U. S. C. A., is in no wise aided by what either Appellant or the Mexican carrier did, to which Appellee was not a party.

10. The Court erred in finding, essential to its judgment reversing that of the Trial Court, that "freight charges (for

transportation in Mexico) were actually paid," for there is no stipulation or evidence to support that finding, and the burden to establish that Appellee issued a thru bill of lading essential to recovery under Sec. 20, Par. 11, 49 U. S. C. A., is in no wise aided by what Appellant paid or did not pay, for transportation in Mexico, to which Appellee was not a party.

11. The Court erred in finding, essential to its judgment reversing that of the Trial Court, that "by reason of the method adopted by Appellant and Appellee in effecting arrangements for further transportation of Appellant's property to its ultimate destination in Mexico," it was unnecessary for Appellant to make any contract in Mexico with respect to transportation there, for there is no pleading nor stipulation nor evidence to sustain that finding. The express stipulations are clear that after Appellee delivered to the agent of Plaintiff the instrument sued upon, "he completed his arrangements with the Mexican customs office to permit importation of said shipment into Mexico, so notified the defendant, and it thereupon placed [fol. 103] said cars on the boundary line," for further transportation.

12. The Court erred in simultaneously holding that liability arises in this case under Sec. 20, Par. 11, 49 U. S. C. A., but that Sec. 6, Pars. 1, 4, 5 and 7 of the same statute have no application because of Sec. 1, Par. 2, 49 U. S. C. A., and because of lack of power to order or regulate rates in Mexico.

13. The Court erred in holding and thereupon reversing the judgment of the Trial Court that within the meaning of Sec. 20, Par. 11, 49 U. S. C. A., Appellee was a connecting carrier with the National Railways of Mexico at the international boundary line where the termini of their rails make physical contact, for this:

(a) The stipulations and undisputed facts establish contact of the rails and an understanding between Appellee and the Mexican Lines that when Appellee places a car at the place of contact, which is destined for Mexico, the Mexican Lines will there accept the car for its further transportation in contemplation of its original shipment, and no more. No facts are carried in the record upon which to find any other agreement of any sort upon which to create

agency, agreement with respect to rates, or further transportation in Mexico, or the collection of freight charges, or settlements with respect thereto, some or all of which are essentially contemplated within the Interstate Commerce Act with respect to connecting carriers. D. & R. G. Ry. v. I. C. C. 195 Fed. 973.

14. The Court erred in reversing and rendering and in not affirming the judgment of the Trial Court.

ARGUMENT

The proportion of the special export rate Appellee received through the Sharon bill of lading was established by law as the compensation it should receive for discharging the duty imposed upon it by said bill of lading to transport the shipment from Alice, Texas to the international boundary line. Appellee performed that service and discharged the Sharon bill of lading obligation. It was never [fol. 104] cancelled and was subsequently sued upon to final judgment in a Federal Court in Pennyslvania.

The instrument sued upon and held by the Court to be a through bill of lading was a wholly new and distinct undertaking, if intended as a through bill of lading, to transport the property from Laredo, Texas to the international boundary line and thence to El Oro in the Republic of Mexico. It constituted a new and independent contract and imposed new obligations, among which has been held to be liability to Appellant for Mexican negligence. No duty was imposed upon Appellee to execute and deliver any such instrument. It admittedly received no compensation and was promised none other than that received through the Sharon bill of lading. To hold that any consideration for the instrument sued upon as a through bill of lading contract was supplied from that prescribed by law for a wholly different and distinct service rendered is wrong. Compensation fixed by law, forbidden to be varied from and paid for one service fully acquitted and discharged is simply no consideration to support a new undertaking imposing additional and new obligations and liabilities. To even permit it would be to approve rebating, forbidden by the statute.

The simultaneous holdings upon the same facts, as the Court has accomplished, that the provisions of Sec. 6, Pars. 1 and 7, Title 49 U. S. C. A., requiring that rates and

tariffs be made and published before engaging upon the transportation, are not applicable to transportation from a point in the United States to a point in an adjacent foreign country, nor here, so far as the transportation within the United States and the contracts with respect thereto and there made are concerned, and that the provision of Sec. 20, Par. 11 of the same title, which imposes initial carrier liability upon the domestic carrier for negligence occurring in a foreign country, is applicable to such transportation, tender a difference destitute of distinction.

If the character of the transportation prevented application of one section of the statute, it did the other. If both [fol. 105] sections be given effect, then, transportation from the Laredo yards to the international boundary line and the execution and delivery of the instrument sued upon and held to be a through bill of lading all within the United States were clearly within the provisions of Sec. 1, Par. 2 of the act and were denounced by Sec. 6, Pars. 1 and 7 of the Act, and the judgment to the contrary is erroneous.

The simultaneous holdings accomplished that no duty rested upon Appellee to execute the instrument sued upon as a through bill of lading, and that, nevertheless, it voluntarily did so in the teeth of the instrument itself, which contains no words of agreement by Appellee to transport and deliver the property beyond the international boundary line, but which merely states the destination to be El Oro, Mexico, as was disclosed from the Sharon bill of lading; and which does carry in clear words the express limitation of obligation to transport, "to carry to its usual place of delivery at said destination, if on its own road • • • ; otherwise to deliver to another carrier on the route to said destination"; which limitation is not forbidden by any law with respect to shipments from a point in the United States destined to an adjacent foreign country, nor to this shipment; and which instrument expressly stipulated "that every service to be performed hereunder shall be subject to all the conditions not prohibited by law, whether printed or written, herein contained"; viewed in the light of the stipulations and undisputed facts may not be harmonized, and the holding, as matter of law, that the instrument upon its face evidences a through bill of lading,

within the meaning of Sec. 20, Par. 11, 49 U. S. C. A., is wrong.

If the pleading of Appellee that neither party intended nor understood at the time the instrument was executed and delivered that it should evidence a through bill of lading contract and that no consideration moved from Appellant to Appellee to support it as such a contract are not supported as a matter of law by the stipulations, undisputed facts and only inferences deducible therefrom, neverthe- [fol. 106] less, the Trial Court had the right to so find from them. Such findings were not attacked by any assignment of error. In that situation it was the exclusive power of the trial court to make the findings and the duty of this Court to conclusively presume they were made so as to support the judgment. The Court has erroneously adjudged otherwise.

Appellee submits the Court has confused the liability imposed by Sec. 20, Par. 11, 49 U. S. C. A. with respect to purely interstate shipments, where Sec. 6, Par. 1, 49 U. S. C. A. and other paragraphs of said section had been complied with and where the statute plainly imposes upon domestic carriers the absolute duty, upon application, to make and publish through rates and tariffs governing interstate shipments between points in different states with liability with respect to shipments originating within a state but destined to an adjacent foreign country, where no rate has been made or tariff published and there is no duty to do so nor power to require it to be done, with respect to initial carrier liability imposed in interstate shipments even without issuance of a bill of lading and with respect to a shipment from a point within the United States to an adjacent foreign country where initial carrier liability is expressly conditioned upon actual issuance of a through bill of lading.

Moreover, it is believed the Court has not fully considered the paralyzing effect of the holding herein opening wide and unrestricted the avenues for rebating and discrimination with impunity in favor of shippers of goods from points within the United States destined to an adjacent foreign country.

For the reasons set forth Appellee respectfully moves the Court to grant a rehearing to thereupon correct each of the several errors hereinbefore assigned, to set aside

the opinion and judgment heretofore rendered, to affirm the judgment of the Trial Court and to award Appellee its costs and general relief.

Respectfully submitted, E. H. Borchers, Laredo, Texas, M. G. Eckhardt, Corpus Christi, Tex., J. D. Dodson, San Antonio, Tex., by J. D. Dodson, Attorneys for Appellee.

[fols. 107-108] Certificate of Service of Copy of This Motion

Appellee represents that Fulbright, Crooker, Freeman & Bates, whose Post Office address is Houston, Texas, are attorneys of record for Appellant and that a true and correct copy of this motion has been delivered to them by depositing same in the U. S. mails at San Antonio, Texas, addressed to them, postage prepaid.

J. D. Dodson, Attorney for Appellee.

[fols. 109-114] In the Court of Civil Appeals of Texas

Order of the Court on Motion for Rehearing—Dec. 12, 1945

[Title omitted.]

The motion of appellee for rehearing, filed November 14, 1945, coming on to be heard, it is ordered that said motion be, and it is hereby, overruled; that appellee, The Texas-Mexican Railway Company, pay all costs of this motion.

[fol. 115] In the Supreme Court of Texas

The Texas Mexican Railway Company, Petitioner

vs.

Mexican Light & Power Company, Ltd., Respondent

Application for Writ of Error—Filed February 13, 1946

To the Honorable Supreme Court of Texas:

Petitioner, The Texas Mexican Railway Company, is a common carrier railroad corporation engaged in interstate

commerce, organized under the laws of Texas, and at all times herein involved was and now is engaged in business soley within the State of Texas. Respondent, Mexican Light & Power Company, Ltd., is a Canadian corporation, and at all times herein involved was and now is engaged in business in the Republic of Mexico.

This Application is for Writ of Error to the Honorable Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, at San Antonio, to review its judgment rendered in cause No. 11544, styled Mexican Light & Power Company, Ltd., Appellant, vs. The Texas Mexican Railway Company, Appellee. Said judgment was rendered October [fol. 116] 31, 1945. Motion for Rehearing was seasonably filed in said Court on November 14, 1945; was overruled without comment on December 12, 1945, and this Application is filed in the office of the Clerk of said Court on the 10 day of January, 1946.

Statement of the Case

The opinion of the Court of Civil Appeals correctly states the nature and result of the suit, except in the following material particulars which will later fully appear herein, to-wit:

1. Petitioner affirmatively pleaded the instrument sued upon as a through bill of lading was not intended, issued nor accepted as such. The opinion states, certainly without uncontradicted support in the evidence, "The bill of lading issued by Appellee (Petitioner) was accepted by Appellant (Respondent), or its agent, as and for a contract for shipment through to El Oro, Mexico." Stipulations sustain the inference the pleading was correct. (Grounds 10 1 (a) and 8, Motion for Rehearing.)

2. The opinion states as a fact, without pleading or evidence to sustain it, that, "No contract of carriage was entered into between the Appellant (Respondent) and the Mexican carrier, and none was necessary by reason of the method adopted by Appellant and Appellee (Petitioner) in effecting arrangements for further transportation of Appellant's property to its ultimate destination in Mexico." (Ground 9, Motion for Rehearing.)

3. The opinion states that, "a connecting carrier is regarded as the agent of the initial carrier, regardless of the

actual contract relationship existing between the two," from which it might be inferred contractual relationship here existed between Petitioner and the Mexican carrier with respect to the contract for carriage to El Oro, Mexico. Such inference is clearly negatived by the undisputed record. [fol. 117] There did exist a "general understanding that upon delivery by Appellee (Petitioner) at the international boundary line, the National Railways of Mexico would receive said property and equipment," for further transportation by the Mexican Line as originally intended and evidenced by the Sharon, Pa. bill of lading, which was essential to give effect to exportation. Said understanding is absolutely all-inclusive of the substance of evidence upon which to presume or to infer agency of either Petitioner or the Mexican Line, or of authority for Petitioner to make any contract binding the Mexican Line.

It is essential to a fair appraisal of the opinion (when considered alone) that each foregoing specification be kept in mind.

Statement of Jurisdiction

The Supreme Court has jurisdiction of this suit under:

(a) Article 1728, Par. 3, Revised Civil Statutes;
(b) Article 1728, Par. 6, Revised Civil Statutes.

Points

First Point

(Statement, Argument and Authorities P. 8-18 of Brief)

Petitioner affirmatively pleaded as a defense that at the time the instrument sued upon was issued, executed and delivered, neither party intended nor understood it to be a through bill of lading from Laredo, Texas, to El Oro, Mexico, nor more than a receipt and evidence of the obligation of Petitioner to safely deliver the shipment to the international line and for use of Respondent's agent in making his arrangements for importation into Mexico. Inferences reasonably drawn from the undisputed record sustain the [fol. 118] pleading. Without aid of jury the Trial Court rendered a general judgment in favor of Petitioner, and no conclusions of fact nor of law were requested or filed.

In such situation, it was error for the Court of Civil Appeals to refuse to presume in support of said judgment

that the Trial Court found the facts in favor of said defense, which would have exacted affirmance of said judgment. (Grounds 1 and 1 (a), Motion for Rehearing.)

Second Point

(Statement, Argument and Authorities, P. 18-18 of Brief)

It is the exclusive province of the Trial Court in trials before the Court without a jury to determine all issuable findings when supported by evidence, or legitimate inferences drawn therefrom, and the Court of Civil Appeals has no jurisdiction to overrule such findings and substitute its own material to a reversal of the judgment. Therefore, there being evidence to sustain a finding by the Trial Court in favor of its judgment that the instrument sued upon was not intended nor understood by either party at the time it was issued to be a through bill of lading from Laredo, Texas to El Oro, Mexico, it is error for the Court of Civil Appeals to reverse the Trial Court by finding the fact of intention and understanding contrary to that found by the Trial Court as reflected in its judgment. (Grounds 1 and 1 (a), Motion for Rehearing.)

Third Point

(Statement, Argument and Authorities P. 19-22 of Brief)

Petitioner affirmatively pleaded as a defense that the instrument sued upon was destitute of consideration as a through bill of lading from Laredo, Texas, to El Oro, Mexico, and was, therefore, unenforceable as such. Inferences reasonably drawn from undisputed record sustain the pleading. [fol. 119] Without aid of jury the Trial Court rendered a general judgment in favor of Petitioner, and no conclusion of fact nor of law were requested or filed.

In such situation, it was error for the Court of Civil Appeals to refuse to presume in support of said judgment that the Trial Court found the facts in favor of said defense, which would have exacted affirmance of said judgment. (Grounds 1 and 1 (b), Motion for Rehearing.)

Fourth Point

(Statement, Argument and Authorities P. 22-31 of Brief)

Issuance of the instrument sued upon as a through bill of lading from Laredo, Texas, to El Oro, Mexico, and all

transportation of the property therein described by Petitioner occurred within the boundaries of the United States and, under the provisions of Sec. 1, Par. 2, Title 49 U. S. C. A., were subject and subordinate to the Interstate Commerce Act and to applicable orders of the Interstate Commerce Commission." (Grounds 3 and 3 (a), Motion for Rehearing.)

Fifth Point

(Statement, Argument and Authorities P. 22-31 of Brief)

Issuance of the instrument sued upon as a through bill of lading from Laredo, Texas, to El Oro, Mexico, and any transportation by Petitioner of the property therein described, all having occurred within the boundaries of the United States, and the undisputed record having established that nothing had been done required by Sec. 6, Pars. 1, 4, 5 and 6, Title 49 U. S. C. A., to authorize Petitioner to engage in transportation from Laredo, Texas, to any point in Mexico. Petitioner was forbidden by law to engage upon such transportation and to issue a through bill of lading therefor by the express provisions of Sec. 6, Par. 7, Title 49, U. S. C. A.

[fol. 120] Therefore, in holding that through rates and compliance with said statutes are not necessary to issuance of a through bill of lading from a point in the United States to a point in a foreign country, and in thereupon reversing and rendering the judgment of the Trial Court, the Court of Civil Appeals erroneously construed and refused to uphold said Sec. 6, Pars. 1, 4, 5 and 7, Title 49 U. S. C. A. (Grounds 1, 3, 1 (c), 6 and 6 (a), Motion for Rehearing.)

Sixth Point

(Statement, Argument and Authorities P. 31-36 of Brief)

The "through bill of lading" contemplated and intended in Sec. 20, Par. 11, Title 49 U. S. C. A., is a bill of lading issued for transportation which Petitioner is not forbidden by statute and applicable orders of the Interstate Commerce Commission to engage upon; Therefore, in holding that by execution of the instrument, Sec. 20, Par. 11, 49 U. S. C. A., imposed upon Petitioner liability for negligence in Mexico, the Court of Civil Appeals erroneously construed and misapplied said statute, for engagement upon transpor-

tation here alleged was forbidden, (Grounds 6, 6 (a), 7 and 7 (a), Motion for Rehearing.)

Seventh Point

(Statement, Argument and Authorities P. 3136 of Brief)

The "through bill of lading" contemplated and intended in Sec. 20, Par. 11, Title 49 U. S. C. A., is an instrument issued for a consideration paid or promised for the obligations resulting therefrom, and the undisputed record establishes that Petitioner was neither paid nor promised any consideration for issuance of the instrument sued upon as a through bill of lading. Therefore, in holding that by execution of the instrument, Sec. 20, Par. 11, 49 U. S. C. A., imposed upon Petitioner liability for negligence in Mexico, [fol. 121] the Court of Civil Appeals erroneously construed and misapplied said statute. (Grounds 3, 3(c), 7 and 7 (a), Motion for Rehearing.)

Eighth Point

(Statement, Argument and Authorities P. 32-36 of Brief)

The "through bill of lading" contemplated and intended in Sec. 20, Par. 11, Title 49 U. S. C. A., is a bill of lading issued for transportation from a point in the United States to a point in an adjacent foreign country in consideration of a rate established and made and posted from the point of origin to the point of delivery, or established rates over each of the lines participating in the transportation by which the through rate is determined. The undisputed record establishes that no rate existed, was made or posted for transportation from Laredo, Texas, to El Oro, Mexico, or any other point in Mexico. Therefore, in holding that by execution of the instrument, Sec. 20, Par. 11, 49 U. S. C. A., imposed upon Petitioner liability for negligence in Mexico, the Court of Civil Appeals erroneously construed and applied said statute. (Grounds 1, 1 (c), 3, 3 (a), and 3 (c), Motion for Rehearing.)

Ninth Point

(Statement, Argument and Authorities P. 31-36 of Brief)

Sec. 20, Par. 11, Title 49 U. S. C. A., does not contemplate nor intend to impose, without recourse, liability upon an

initial carrier for sole negligence of another carrier. The statute, itself, provides the recourse where both carriers are within the jurisdiction of the United States. Actual issuance of a "through bill of lading" with respect to a shipment from the United States to a foreign country presupposes contractual arrangements between the participating carriers and, at least, the opportunity for the domestic carrier to thereby protect itself from becoming liable without recourse [fol. 122] for sole negligence of the foreign carrier. The undisputed record established that with respect to transportation and rates and authority to issue bills of lading, no contract of any sort existed between Petitioner and the Mexican Lines in this case, and that if required to pay this judgment, Petitioner will be required to pay, without recourse, for Mexican negligence. Therefore, in holding that Sec. 20, Par. 11, Title 49 U. S. C. A., imposed liability upon Petitioner by reason of its issuance of the instrument sued upon and thereupon reversing and rendering the judgment of the trial Court, the Court of Civil Appeals necessarily erroneously construed and applied said Sec. 20, Par. 11, 49 U. S. C. A. (Grounds 1, 1(c), 1(d), 4, 4(a), 13 and 13(a), Motion for Rehearing.)

Tenth Point

(Statement, Argument and Authorities P. 31-36 of Brief)

The holding that Sec. 6 of the Interstate Commerce Act does not apply to the instrument sued upon, but that Sec. 20, Par. 11, of the same Act does apply, is opposed to reason, finds no support in the Act or elsewhere and is an anomaly, for jurisdiction under the Act is entire and not partial. Therefore, the Court of Civil Appeals erred in making such holding and in thereupon reversing and rendering the judgment of the Trial Court. (Ground 12, Motion for Rehearing.)

Statement Under First and Second Points

(Stated P. 3-4 of Brief)

Pleadings

Petitioner pleaded:

"At the time said instrument was executed and delivered it was not intended nor understood by either party that

thereby Defendant was assuming toward Plaintiff responsibility for negligence beyond the line of Defendant," (1(a) Tr. 16).

[fol. 123] "Defendant issued in form its bill of lading upon which to effect delivery of said shipment to the National Railways of Mexico as aforesaid; said bill of lading was intended merely as a receipt and as shipping directions and upon its face showed that there was no rate or charge made therefor. Thus defendant received no compensation nor promise thereof except from the revenue derived from the export rate paid upon said shipment for moving the same from Sharon, Pennsylvania to the boundary line aforesaid, and this defendant in fact received no consideration for the execution and delivery by it of its bill of lading in the form as aforesaid, upon which to found any liability against this defendant after the completion by it of delivery to the National Railways of Mexico, and defendant - - - was - - - neither an originating nor delivering carrier of said shipment either in fact or in contemplation of the Cummins Amendment to the Transportation Act, known as 49 U. S. C. A., par. 20, Section 11." (Tr. p. 20, 21.)

"The obligation of liability upon an initial carrier imposed by said amendment with respect to shipments originating within the United States, with the intention and direction that such shipments are for export and to be delivered to the National Railways of Mexico, at the line to complete such export, was not intended by Congress to apply where no contractual agreements between the transportation lines in the country and the National Railways of Mexico exist, either with respect to the issuance of through bills of lading or for the sharing by the lines in this country of rates charged against and revenue received for such transportation beyond said boundary line, and no such contractual agreement or arrangement exists or existed between any carrier in the United States which handled said shipment and the National Railways of Mexico - - -." (Tr. 21, 22.)

[fol. 124] Petitioner specially pleaded there was no consideration for the issuance of said bill of lading and it was

issued solely for the convenience of respondent's agent and as part of the mechanics to effect uninterrupted delivery of the shipment to the National Railways at the boundary line (Tr. 22), and specially pleaded the conditions on the face of the bill of lading with respect to being subject to classifications and tariffs, and that no classifications and tariffs existed applicable to the shipment, and that the only obligation with respect to carriage (if the destination was not on the line of petitioner, which it was not), was to deliver to another carrier in route, which petitioner did. (Tr. 23.)

Petitioner further pleaded that failure to stipulate for any rate or compensation to this petitioner for transportation beyond its own line and in Mexico and the use of a form expressly designating on its face to be a domestic form of bill of lading, which was in general use for domestic shipments, and not being a form of bill of lading contracting for safe carriage of goods in Mexico, for a rate into Mexico, and the non-existence of any tariffs or rates applicable to said shipment beyond the line of this petitioner and into Mexico, and the failure to have any rate agreed upon or promised to be paid by respondent to this petitioner for transportation of the shipment beyond the terminus of petitioner's line and into Mexico, with no obligation being imposed upon petitioner to issue a through bill of lading subjecting it to liability as initial carrier under the Cummins Amendment, each and all negatived any intention or understanding of the parties that said instrument was a through bill of lading from Laredo to El Oro, Mexico. That petitioner had the lawful right to expressly limit its obligation to deliver to its connecting carrier at the international boundary line where the Sharon bill of lading obligated it to so deliver, and the failure to receive or be promised any compensation other than through the Sharon bill of lading for delivery at the boundary line, evidence that said instrument was not nor intended to be a through bill of lading in contemplation of the Cummins Amendment. (Tr. 24.)

[fol. 125]

Petitioner further pleaded that respondent attempted to collect from the National Railways of Mexico the identical damages it here seeks to recover from petitioner, and after presenting its claim to petitioner in March, 1936, which was declined in April, 1936, respondent filed this suit and about September, 1936, filed suit against the Pennsylvania

Railroad Company for the identical damages claimed here, alleging that its bill of lading was a through bill of lading to El Oro, and after failing in the Pennsylvania suit, it then brought this suit to trial, which facts petitioner alleged as showing that respondent did not at the time said instrument was issued understand or rely upon it to be a through bill of lading imposing liability upon petitioner for negligence in Mexico. (Tr. 25.)

Evidence

The instrument sued upon will be found in the Statement of Facts as Exhibit "B." In addition to the statement as to contents found in the opinion by the Court of Civil Appeals, that the instrument recited the agreement was for carriage to its usual place of delivery at "said destination," if on Petitioner's line, "otherwise to deliver to another carrier on the route to said destination"; and that the destination was "El Oro, State of Mexico"; and was made upon a prepared form for "a domestic straight bill of lading"; and that the receipt clause was "subject to the classifications and tariffs in effect * * *"; and that no rates or charges are set forth, and that it stipulated that delivery would not be made without payment of lawful [fol. 126] charges; and that no through tariff from Laredo, Texas, to El Oro or any other point in Mexico was in effect, the following facts not disclosed from the opinion were established by stipulations:

> "Fausto Trevino as agent did not pay to the Texas Mexican Railway Company for carriage charges any other charges than those applicable from Sharon, Pennsylvania to Laredo, Texas, which included placing the shipment at the international boundary line where it was delivered to the National Railways of Mexico." (III, S. F. 13.)
>
> "After the instrument sued upon by plaintiff and alleged to be a bill of lading issued by the defendant, was delivered to Fausto Trevino, as agent for plaintiff, he completed his arrangements with the Mexican Customs Office to permit importation of such shipment into Mexico and so notified the defendant, and it thereupon placed said cars on the boundary line (1st, S. F. 18)."

"The defendant has not and had no agreement at the time it signed said instrument with the Mexican Lines, whereby the defendant received any portion of revenue from any traffic moving in Mexico * * *". (2nd S. F. 18)."

"Defendant received no portion of the revenue paid to Mexican Lines for transporting the shipment in question from the boundary line south, and defendant had no agreement to receive any portion of such revenue." (3rd, S. F. 19.)

"The defendant has no agreement and had none at the time the shipment involved moved, whereby it may recoup or will be reimbursed for any damage it may pay for the negligence of the Mexican Lines." (4th, S. F. 19.)

"The defendant received for its own use and benefit from the freight charges from Sharon, Pennsylvania to Laredo, Texas, which were paid by plaintiff on the shipment in question, a division - - - as its compensation for transporting the shipment involved from Alice, [fol. 127] Texas to Laredo, Texas, and for delivering same at the international boundary line - - -; such freight charges having been based upon the export rate from Sharon, Pennsylvania to Laredo, Texas - - - slightly lower than the domestic rate and was applied because the Pennsylvania Railroad bill of lading originally issued at Sharon, Pennsylvania, had endorsed on it 'for export.' " (5th, S. F. 19.)

It was also stipulated and we take it it was assumed in the opinion by the Court of Civil Appeals that Petitioner at all times has been and now is a railroad corporation under the laws of Texas, engaged in operating a line only from Corpus Christi to Laredo, Texas, at the international boundary line, as a common carrier of goods for hire in interstate commerce, and is not engaged in business in Mexico. (S. F., Par. 2, P. 3.)

JUDGMENT

A general judgment was rendered in favor of Petitioner (Tr. 32-33). No conclusions of fact nor of law were requested or found. No assignment of error was filed or point tendered in the Brief in the Court of Civil Appeals,

as we read the record and brief, attacking the finding of fact by the Trial Court that the intention and understanding of the parties was precisely as pleaded.

The Court of Civil Appeals made two findings in its opinion contrary to those of the Trial Court's judgment supported by pleading: 1st, that neither party intended nor understood at the time the instrument sued upon was executed that it was in fact a through bill of lading from Laredo to El Oro, Mexico; 2nd, that the instrument as a through bill of lading was not supported by any consideration. These findings by the Court of Civil Appeals are quoted in Pars. 1 and 2, pages 2, under "Statement [fol. 128] of the case." We find no stipulation and no fact in the record to support either of said findings by the Court of Civil Appeals.

Authorities

Matthews et al. v. Looney, et al., 100 S. W. (2d) 1061 (San Antonio Court of Civil Appeals);
Illinois Match Co. v. C. R. I. & P., 95 N. E. 492, 494.

Argument Under First and Second Points

(Stated P. 3-4 of Brief)

Ingenuity and inaccurate statements may obscure but they may not wash from the record three pertinent facts: First, at the time the instrument sued upon was issued neither party in good faith intended or understood it to be a through bill of lading from Laredo to El Oro, Mexico; second, Respondent did not give and Petitioner did not receive anything in consideration for its issuance; third, the judgment of the Court of Civil Appeals would exact that Petitioner, without recourse, itself and at its own expense compensate Respondent for Mexican negligence.

The Court of Civil Appeals concedes no obligation rested upon Petitioner to issue a through bill of lading. Issuance or not was purely optional to Petitioner. That is to say, its issuance must be voluntary. A voluntary act involves intention. Intention should be determined from relevant facts and circumstances which surround and accompany the act. Speculation has no proper place in determining intention. Voluntary means, without compulsion; with consent; by choice or volition; free choice; in accordance with will; intentional. (New Standard Dictionary, 1945

Edition.) "Such option does not exist with respect to an interstate shipment. The statute, itself, there raises the obligation of the initial carrier and secures to it recoupment [fol. 129] when called upon to pay for negligence of another carrier. With respect to a shipment from a point in the United States to an adjacent foreign country, the same statute raises the obligation, only, when the initial carrier actually issues a through bill of lading, and the statute makes no provision for recoupment. Petitioner and Respondent are both conclusively presumed to have known the provisions of the Interstate Commerce Act when the instrument sued upon was issued. It contains no word obligating Petitioner for safe delivery beyond the international boundary line. Petitioner had the right to expressly limit its liability to its own line. In full exercise of that right, the instrument, itself, in clear, unambiguous language limited its obligation with respect to carriage, "to carry to its usual place of delivery at said destination, if on its own road or water line, otherwise to deliver to another carrier on the route to said destination." "Said destination" was El Oro, Mexico, and was not on the line of Petitioner. Petitioner safely delivered the shipment to the Mexican Lines, whose rails contact those of Petitioner at the terminus of its line at the international boundary. They were the next carrier en route to "said destination." Thus, with respect to the contract bespoken by the instrument itself, Petitioner fully performed as it was written and clearly protected itself against the obligations imposed by a through bill of lading. The language used by the parties negatived their intention that it should be a through bill of lading. To overturn the finding by the Trial Court that it was not a through bill of lading in this situation is to close the eye and ear and make a contract the parties did not intend to make.

Moreover, as a through bill of lading, the form used was expressly conditioned upon rates and tariffs then existing. There were none. The sole charge paid by Respondent was that paid under the Sharon bill of lading. The Court of [fol. 130] Civil Appeals concedes that payment "included placing the shipment at the international boundary line." Petitioner had no agreement with the Mexican Lines to receive and did not receive any portion of revenue paid to the Mexican Lines for transportation beyond the boundary line. It had no agreement for recoupment if it issued a

through bill of lading and thereby voluntarily assumed under Sec. 20, Par. 11, 49 U. S. C. A. responsibility for Mexican negligence. The instrument was executed and delivered with full knowledge of these facts on the part of Petitioner.

> "A bill of lading is both a written acknowledgment of the receipt of goods and also an agreement for a consideration to transport and deliver the same at the specified place to a person therein named or his order. It has two-fold character of a receipt and an agreement."
>
> Illinois Match Co. v. C. R. I. & P., 95 N. E. 492, 494.

As a receipt and presentable evidence of the readiness and obligation of Petitioner to deliver the shipment at the international boundary line for further transportation as directed in the Sharon bill of lading, the instrument was complete. As a contract to transport to El Oro for an agreed rate it was not complete. After its delivery to the agent of Respondent, "he completed his arrangements (not petitioner's arrangements as suggested by the Court of Civil Appeals) with the Mexican Customs Office to permit importation of the shipment into Mexico and so notified Defendant (Petitioner), and it thereupon placed said cars on the boundary line." (1st S. F. 18.)

In the light of that record, the Trial Court was intitled to find that the parties, themselves, never intended nor understood the instrument to be a through bill of lading, and that it was used by the agent of Respondent in making his arrangements with Mexican authorities as evidence of the presence of the shipment in the possession of Petitioner [fol. 131] and its readiness to deliver said shipment at the boundary line for further transportation by the Mexican Lines. It is folly to say no reasonable ground existed from which the Trial Court drew the inference the parties did not make a contract for through transportation to or safe delivery at El Oro, Mexico.

Indeed, the Court of Civil Appeals has not held, upon the record made, that such inference could not be drawn. It did not reverse the judgment and that presumed finding solely upon facts within the confines of the record. Rather, the Court of Civil Appeals first enlarged the facts by its statements without record support that the instrument was

accepted by Respondent's agent as a through contract, and that by reason of its issuance no further contract was made or was necessary to be made by Respondent with the Mexican Lines. The first finding has no support in the record and the second is repugnant to the record which establishes that Petitioner had no contractual relations with the Mexican Lines with respect to transportation of the shipment, further than they would accept it for further transportation upon delivery at the boundary line. With respect to the issue of intention, the Court of Civil Appeals should have presumed the finding in favor of the judgment and have affirmed it. That duty has not been more tersely nor clearly stated than by the Court of Civil Appeals in Matthews v. Looney, 100 S. W. (2d) 1061. That case was reversed on other grounds, but its holding with respect to that duty was supported by citation of authorities and was not criticized nor overturned.

The Court of Civil Appeals correctly said that Petitioner could not lawfully receive an additional sum of money for transporting the shipment from its yards in Laredo to the boundary line to that paid under the Sharon bill of lading. That payment was fixed by law for performing a certain [fol. 132] service which was fully discharged upon making safe delivery of the shipment at the boundary line. It would have clearly been a rebate and just as unlawful for Petitioner to have undertaken or have performed any service for the payment made under the Sharon bill of lading than was imposed by that bill of lading as to have demanded more compensation for the service. (Sec. 6, Par. 7, 49 U. S. C. A.)

In the light of this record, Petitioner submits: First, the intention pleaded and found by the judgment is sustained by the record and forbids the instrument to a voluntary through bill of lading contract, which the Court of Civil Appeals held it to be; second, the Court of Civil Appeals was without lawful power to overturn findings made by the Trial Court and sustained by the record by assuming facts not found in the record, as was done; third, the Court of Civil Appeals disregarded its clear duty when it refused to presume in favor of the judgment that the Trial Court found the parties themselves did not intend or understand the instrument to be a through bill of lading and

thereupon reversed and rendered the judgment of the Trial Court.

Statement Under Third Point

(Stated P. 4-5 of Brief)

The Court is requested to consider in connection with this Statement that submitted under First and Second Points, pages 8-14 of Brief.

Pleadings

Petitioner affirmatively pleaded as a defense that there was no consideration for execution of the instrument (2(b). Tr. 17; (e) Tr. 20; Tr. 2) 7.

Opinion of Court of Civil Appeals

The opinion finds that charges were paid for transportation in Mexico "although Appellee received no part of them," and that, "Appellee having been paid for transpor-[fol. 133] tation to the international boundary line could not lawfully receive an additional sum of money for transporting the property from its yards in Laredo to said boundary line * * *."

Stipulations

The Stipulations quoted in Statement under First and Second Points, supplemented by the opinion, indisputably establish that the instrument sued upon is destitute of consideration, unless it be supplied from the compensation fixed by law for the service obligated and rendered under the Sharon, Pa. to Laredo bill of lading. The Court of Civil Appeals so supplied it. The shipment was transported by Petitioner from Alice, Texas, to Laredo, Texas, September 28, 1934; the instrument sued upon was issued and delivered September 29, 1934, and Respondent's agent thereafter made his arrangements for importation into Mexico (Pars. 3, 7, S. F. 4, Stipulations quoted on page 13 Supr.)

Authority

Sec. 6, Par. 7, Title 49 U. S. C. A.

Argument Under Third Point

(Stated P. 4-5 of Brief)

It is clear from the opinion that the Court of Civil Appeals held the instrument sued upon was supported by a

valuable consideration through the share which Petitioner received of the charges Respondent paid in consideration for the Sharon bill of lading which obligated safe delivery at the international boundary line, and that it was immaterial whether the transportation from the yards of Petitioner in Laredo to the line was under the Sharon bill of lading or under the instrument sued upon. If those holdings be sound, there ends the no consideration defense. That they are not sound we believe readily demonstrable. [fol. 134] No rate was made and no tariff was posted to govern a through shipment from Laredo, Texas, to El Oro, Mexico, nor from the yards of Petitioner in Laredo to the international boundary line. Rates were made and tariffs were posted for the movement from Sharon, Pa. to the boundary line, and Petitioner's compensation was a portion of that rate for its service in transporting from Alice, Texas, to the boundary line. The Court of Civil Appeals does accept that under the Interstate Commerce Act it would have been unlawful for Petitioner to have demanded or received any additional compensation for its service in effecting the delivery at the boundary line. The Interstate Commerce Act prescribed the charge paid to be for the service exacted under the Sharon bill of lading. The same Act under which the charge was fixed and the service in consideration therefor was specified not only forbade Petitioner from exacting any other or additional compensation, but in apt language forbade Petitioner to "refund or remit in any manner or by any devise any portion of the rates, fares and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation * * * except such as are specified in such tariffs" (Sec. 6, Par. 7, Title 49 U. S. C. A.). The tariffs did not specify that the charges therein fixed could be extended as consideration for the issuance by Petitioner upon arrival at Laredo of a new and distinct undertaking to transport the shipment to El Oro, Mexico, on a through bill of lading. The stipulations exclude any doubt with respect thereto. The holding by the Court of Civil Appeals essentially rests upon merging the Sharon bill of lading contract and the compensation paid thereunder, which by law terminated at the international boundary line, with the instrument sued upon as a new and distinct undertaking by Petitioner to contract for through transporta- [fol. 135] tion of the shipment from Laredo to El Oro, Mex-

ico. If the portion of the rate fixed by law and paid to Petitioner for safe delivery at the boundary line under the Sharon bill of lading is used to supply valuable consideration for its issuance and delivery of a through bill of lading contract to transport the shipment thence to El Oro, Mexico, it is idle to say that Respondent did not receive privileges with respect to transportation of the shipment not specified in the tariff under which the compensation was paid. Therefore, the Court of Civil Appeals has simultaneously recognized applicability of the provision of the Act which protects Respondent against further demands under the Sharon bill of lading and wholly disregarded the provision of the same Act which forbids that Petitioner extend to Respondent for the charges paid under the Sharon bill of lading additional privileges to those specified in the tariff for the charge. The privilege of fastening upon Petitioner a $15,000.00 judgment for Mexican negligence is no minor privilege.

Even without the provision of the statute which the holding of the Court of Civil Apeals so plainly disregarded, it challenges sound reasoning to hold that a consideration paid for one contract to render one service to be and which was fully rendered, may properly be supplied by the Court as consideration for another and distinct undertaking which imposes new burdens and obligations. The obligation under the Sharon bill of lading was fully performed. Respondent filed and prosecuted suit to final judgment on it in Pennsylvania. Petitioner adheres to the statement it presented to the Court of Civil Appeals in the Motion for Rehearing there filed that:

> "Compensation fixed by law, forbidden to be varied from and paid for one service fully acquitted and discharged is simply no consideration to support a new [fol. 136] undertaking imposing additional and new obligations and liabilities. To even permit it would be to approve rebating, forbidden by the statute."

The Trial court rendered a judgment in conformity with the statute and refused to follow the erroneous contention in behalf of Respondent, which the Court of Civ Appeals followed, that the Sharon charges shared in by Petitioner constituted a valuable consideration to support the instrument sued upon as a through bill of lading.

Petitioner submits that the Court of Civil Appeals clearly erred therein and should have affirmed and not reversed and rendered the judgment of the Trial Court.

STATEMENT UNDER FOURTH AND FIFTH POINTS

(Stated P. 6 of Brief)

From the opinion and statements hereinbefore made it is clear execution of the instrument sued upon and the transportation by Petitioner of the shipment therein described all took place within the jurisdiction of the United States; that Petitioner is subject to the Interstate Commerce Act, and that no rate or tariff existed or was posted to govern through shipments from Laredo to any point in the Republic of Mexico.

AUTHORITIES

Sec. 1, Par. 2, Title 49 U. S. C. A.;
Sec. 6, Pars. 1, 4, 5, 6, 7, Title 49 U. S. C. A.;
Chicago & Alton v. Kirby, 225 U. S., 155, 32 S. C. R. 648;
Hamlen & Sons v. I. C., 212 Fed., 324;
Southern Ry. v. Reid, 222 U. S., 424, 32 S. C. R., 140;
Stevens v. T. & S. F., 202 N. Y. S., 195 (Certiorari denied 267 U. S., 603, 45 S. C. R. 463).

[fol. 137] ARGUMENT UNDER FOURTH AND FIFTH POINTS

(Stated P. 6 of Brief)

Sec. 1, Par. 2, Title 49 U. S. C. A. provides, among other things,

> "The provisions of this chapter shall also apply to such transportation of - - - property - - -, but only in so far as such transportation - - - takes place within the United States, but shall not apply - - - (a) to the transportation - - - of property - - - wholly within one state and not shipped to or from a foreign country from or to any place in the United States."

The Court of Civil Appeals cites this statute to support its holding that the Interstate Commerce Commission may not exercise extraterritorial jurisdiction in matters of transportation. Petitioner has made no contention that the Interstate Commerce Commission may exercise any extra-

territorial jurisdiction, and the judgment of the Trial Court in nowise depends upon the Interstate Commerce Commission exercising such jurisdiction. The instrument was sued upon as, and was held by the Court of Civil Appeals to be, a through bill of lading for a shipment from a point in the United States to El Oro, Mexico, a point in a foreign country. The contention of Petitioner is that the transportation, in so far as it took place in the United States, was subject to the Interstate Commerce Act, and seems to come within the precise language of Sec. 1, Par. 2, 49 U. S. C. A. Jurisdiction over the transportation carried with it jurisdiction over the instrument sued upon. That the Interstate Commerce Commission has no power to fix rates in Mexico is foreign to any issue material to a decision of this case. To hold that because there is no extraterritorial jurisdiction of the Interstate Commerce Act, there is no jurisdiction over transportation from the United States to a foreign country, which "takes place within the United States," is to nullify the plain language [fol. 138] of the Act. To say that because Congress has no extraterritorial jurisdiction with respect to shipments from a point in the United States to a point in a foreign country, it has none with respect to transportation thereof and the issuance of bills of lading with respect thereto which "takes place within the United States," is foolish.

Goldberg v. Delaware Co., 40 N. Y. S. (2d) 44, cited by the Court of Civil Appeals, dealt with a shipment from Canada into the United States upon a bill of lading issued in Canada and supported by rates posted in the United States, as required by Sec. 6 of the Interstate Commerce Act. The Court there took jurisdiction under the Act and struck from the bill of lading a limitation provision which was repugnant to the limitation provided by the Interstate Commerce Act. Upholding of that jurisdiction does not comport with the holding by the Court of Civil Appeals that Sec. 6 of the Act with respect to rates has no application to through shipments from points in the United States to points in a foreign country, in so far as the transportation occurred here, for there exists no distinction from a jurisdictional viewpoint between shipments to and from the United States.

In Southern Ry. Co. vs. Reid, 222 U. S. 424, 32 S. C. R. 140, suit for damages against the carrier was brought for al-

leged refusal to accept freight for a destination to which no rate had been established and published, as required by the Interstate Commerce Act. There was recovery in the lower courts. The Supreme Court of the United States reversed the judgment upon the ground that since it would have been a violation of the act to have issued the contract for the carriage until rates had been established and published as required by the act, there could be no cause of action for the refusal. Among other things the Court said:

[fol. 139] "As we have seen schedules of rates, whether the road be single or forms with another a 'through route,' must be established, filed and published, designating the places. They cannot be changed without permission of the Interstate Commerce Commission, and no carrier is permitted to engage or participate in the transportation of passengers or property unless the rates for the same have been so filed and pulished. Criminal punishment are imposed for violations of these requirements, and civil redress of injuries received by shippers is given through the Interstate Commerce Commission. See Robinson vs. Baltimore & O. R. Co., 222 U. S. 506, 56 L. Ed. 288, 32 Sup. Ct. Rep. 114. * * *

"We cannot assume that it was without consideration of its necessity that Congress enacted Sec. 2 of the Hepburn Act. It was no doubt the adaptation of experience to the exigencies of a practical problem, - - - Congress coming to believe that the most effective way to prevent preferences in charges by carriers was to forbid them to 'engage or participate in the transportation of passengers or property' until they had fixed and proclaimed the rate to be charged therefor, - - - a rate that would be not only for one shipper or shipment, but for all shippers and shipments; not for one time only, but for all times. The power of Congress to so provide cannot be doubted. * * * There is nothing in the record to show that there were such established separate rates, and that separately established rates were published and kept open for inspection. * * *"

Southern Co. v. Reid, 222 U. S. 424, 32 S. C. R. 144-145.

Following the Reid case it was held in Hamlen & Sons v. I. C., 212 Fed. 324, that there could be no recovery upon a contract for a rate from Little Rock, Arkansas, and Monessen, Pennsylvania, to Buenos Aires, by a carrier over whose lines shipments would move, because no rates or [fol. 140] tariffs had been published. The Court said in part:

> "As the defendant had never published or filed with the Interstate Commerce Commission a through rate to Buenos Aires, it was neither required nor could it make a through rate without violating the Interstate Commerce Law. Southern Ry. Co. v. Reid, 222 U. S. 424, 441, 32 Sup. Ct. 140, 56 L. Ed. 257. • • • "Any contract by which a carrier of interstate freight assumes a more burdensome liability than is specified in the published schedules is a violation of the Interstate Commerce Act and void. C. & A. R. R. Co. v. Kirby, 225 U. S. 155, 32 Sup. Ct. 648, 56 L. Ed. 1033; Clegg v. St. L. & S. F. R. Co., 203 Fed. 971, 122 C. C. A. 273 C. C. C. & St. L. R. R. Co. v. Hirsch, 204 Fed. 849, 123 C. C. A. 145. In the Kirby case it was held that a carrier cannot legally contract with a particular shipper for an unusual service, unless it makes and publishes a rate for such service equally open to all. • • •
>
> "Nor is it an excuse that the plaintiff did not know what rates had been published by the railroad company, and that it relied upon the representations of the agent of the company. It has been authoritatively determined that a shipper is conclusively presumed to have that knowledge. K. C. S. Ry. Co. v. Carl, 227 U. S. 639, 653, 33 Sup. Ct. Rep. 391, 57 L. Ed. 683. • • •"
>
> Hamlen v. I. C. Co., 212 Fed. 324.

In the Kirby case the Supreme Court said:

> "The Elkins Act proceeded upon broad lines and was evidently intended to effectuate the purpose of Congress to require that all shippers should be treated alike, and that the only rate charged to any shipper for the same service under the same conditions should be the one established, published and posted as required by law. • • • The broad purpose of the com-

merce act was to compel the establishment of reasonable rates and the uniform application."

[fol. 141] C. & A. vs. Kirby, 225 U. S. 155, 32 Sup. Ct. Rep. 648.

The Reid case was again followed in Stevens v. A., T. & S. F., 202 N. Y. S. page 195. There the Sante Fe issued bills of lading from various points in Texas to San Francisco, California, containing the clause:

> "To be carried to the port (A) of San Francisco, Cal., and thence by steamship Shinyo Maru II to the port (b) Kobe, Japan, (or so near thereto as ship may safely get, with liberty to call at any usual port of call), and to be there delivered as above consigned * * * at the rate from Brady, Texas, to Kobe, Japan, of one Hundred eighty-five cents, United States gold currency, per one hundred pounds gross weight, and advanced charges."

The cotton was damaged by fire while at San Francisco. The shipper refused payment of freight until the cotton was delivered in Japan. The Railway Company salvaged the cotton and the suit was to determine whether the salvage money belonged to the shipper and it owed the freight charges incurred to San Francisco, or whether the Railroad Company had obligated itself to deliver the cotton at Kobe, Japan, and could not demand any charges until that delivery had been completed. Recovery was soght upon the ground that the bills of lading were through bills of lading constituting contracts for transportation from points of origin to Japan. Said grounds of recovery were overruled. The Court said in part:

> "I believe that defendant has established that the initial carrier was without power to agree for the transportation of the cotton at an inland rate payable only upon delivery at Kobe; and that, as so construed, the provisions of the bill of lading would be 'inconsistent' with the published tariffs and classifications.' (Citing So. Ry. Co. v. Reid, 222 U. S. 424). * * * It is here established that no through rate was [fol. 142] published or filed from said inland points to Kobe, Japan. Furthermore, none was published which was to be payable, as one entire and indivis-

ible amount, only on delivery at Kobe. Therefore, the initial carrier could not make any such through rate without violating the Interstate Commerce Law. In J. H. Hamlen & Sons Co. v. Illinois Central R. R. Co. (D.C.) 212 Fed. 324, it was held that as the defendant in the case had never published *or* through rate to Buenos Aires, it was neither required nor could it make a through rate without violating the Interstate Commerce Law"

The holding in the Stevens case was definitely approved by the Supreme Court of the United States denying an application for certiorari, 45 S.C.R. 463, 267 U.S. 603, 60 L.Ed. 809.

If the instrument sued upon was intended as a bill of lading for transportation from Laredo, Texas to El Oro, Mexico, it essentially involved a contract for transportation partly within the United States and made in the United States. It was, therefore, subject to the Interstate Commerce Act. Petitioner clearly could make no contract forbidden by the Interstate Commerce Act. Impotence of the Interstate Commerce Commission to exercise jurisdiction in Mexico does not detract from its exercise of complete jurisdiction over every carrier act performed in the United States with respect to transportation and bill of lading contracts.

Therefore, we submit the instrument sued upon as a bill of lading contract for transportation from Laredo, Texas, to El Oro, Mexico, is denounced by the statute for non-compliance with its requirements and will not sustain a cause of action upon a benefit extended by the statute.

Respondent successfully disposed of these cases as of no consequence; (pp. 45 and 46 of its brief); the Reid [fol. 143] case on the ground that it merely held a North Carolina Statute interfered with Interstate Commerce; the Kirby case on the ground the contract was merely held unenforceable because it was not authorized by a tariff; the Hamlen case because it was decided before the 1915 amendment; the Stevens case because it was brought merely to determine whether the carriers were entitled to the freight rate or whether the railroad ocean freight was one entity and the carriers were not entitled to any freight because the transportation had not been completed. In the Stevens case the issue turned upon whether or not the

bill of lading was a through bill of lading to Japan. If it was a through bill of lading the carriers had not made delivery and were not entitled to the freight. If it was not a through bill of lading but merely a bill of lading to the export point, carrier was entitled to recover. The Court clearly held, as we read the opinion, that because no tariff was posted to sustain the bill of lading as a through bill of lading, and inasmuch as it showed separately the proportions of the rate from origin to the export point, which were supported by tariffs and delivery had been made there, the recovery could be had to the export point.

The Hamlen case clearly held, as we read it, that the carrier could not there make a lawful rate from Little Rock to Buenos Aires "as the Defendant had never published or filed with the Interstate Commerce Commission a through rate to Buenos Aires." That holding gave full effect to Sec. 6, Pars. 1 and 7, of the Act. If the through bill of lading could not be lawfully issued there for want of a rate and tariff, how could it be done here? And, if a bill of lading could not be lawfully issued, how could it a cause of action under Sec 20, Par. 11, 49 U.S.C.A.?

Just how the Court of Civil Appeals concluded these [fol. 144] cases not applicable here is left to conjecture. They are not mentioned in the opinion, and may have been overlooked by the Court of Civil Appeals.

If we correctly understand the opinion, it strives to uphold the instrument as a through bill of lading partly because the cause of action is for tort and not with respect to rates (which had no existence). We find nothing in the Act and no authority is cited in the opinion and we know of none elsewhere making applicability or not of the Interstate Commerce Act depend upon whether or not tort is involved. It is true if a bill of lading is void under the Act, the common law rights of action for tort or otherwise not founded on the bill of lading may not be defeated because a void bill of lading was issued. But that is not the case here. Recovery must be upon the contract and the statute, and not upon the common law. If recovery is not upon the contract, the undisputed fact that it is sought for Mexican and not Petitioner's negligence is an absolute common law defense.

The effect of the opinion by the Court of Civil Appeals is to simultaneously hold upon the same facts that

the transportation within the United States is not subject to the jurisdiction of the Act with respect to rates and tariffs, but the transportation without the United States is subject to the jurisdiction of Sec. 20, Par. 11 of the same Act. That does not sound right in a forum of reason. The Act either applied or did not apply to this transportation. Surely, the intention imputed to Congress to impose initial carrier liability upon a domestic carrier for negligence in Mexico with respect to property over which Congress never had any jurisdiction, is without support, and is plainly negatived by the statute which is relied upon being by its own terms conditioned upon a "through bill of lading." In absence of that bill of lading there is no [fol. 145] authority in the statute for its application to a shipment from a point in the United States to a point in an adjacent foreign country. The holding by the Court of Civil Appeals would open the doors to rebating and discrimination which Congress has for 60 years strenuously sought to securely close, and permit carriers and shippers of property transported from points in the United States to points in an adjacent foreign country to flout Interstate Commerce Commission control and, with impunity, rebate and discriminate unrestrained.

Petitioner respectfully and earnestly submits the Court of Civil Appeals clearly erred in reversing and rendering the judgment of the Trial Court upon the theory the instrument sued upon could be and was a valid through bill of lading notwithstanding Petitioner had never performed a single act which the Interstate Commerce Act exacted to be performed before Petitioner could engage upon the transportation.

Statement Under Sixth, Seventh, Eight, Ninth and Tenth Points

(Stated P. 6-8 of Brief)

In consideration of the Sixth to Tenth Points inclusive, the Court is requested to bear in mind the Statements hereinbefore made.

In addition, the Court of Civil Appeals held that "the Interstate Commerce Act does not, under the facts of this case, prohibit the fixing of liability upon Appellee as the initial carrier under the through bill of lading issued by it." Petitioner had already conceded at page 5 of its Brief

then before the Court of Civil Appeals that "if the instrument was a valid and enforceable through bill of lading [fol. 146] under Sec. 20, Par. 11, 49 U.S.C.A., Defendant has not had and does not now have the temerity to deny liability."

AUTHORITIES

D. & R. G. Ry. v. I.C.C., 195 Fed. 973;
Illinois Match Co. v. C.R.I. & P., 95 N.E. 492, 494;
Lilly v. Grand Trunk Co., 317 U.S. 481, 63 S.C.R. 347.
Regulations issued by the I.C.C. under its Traffic Circulars No. 20, effective Jan. 11, 1928, and 13a and 18-25 Inc., Sec. 20 Par. 11, 49 U.S.C.A.

ARGUMENT UNDER SIXTH, SEVENTH, EIGHTH, NINTH AND TENTH POINTS

(Stated P. 6-8 of Brief)

The Interstate Commerce Act was designed for all-inclusive control and supervision over interstate commerce and over foreign commerce so far as transportation of the foreign commerce takes place within the United States. It arose to correct abuses which resulted from inequality of rates and enjoyment by favored shippers of special privileges. Some 20 years later the initial carrier amendment was first included. If the purposes of the Act are to be accomplished, it must be construed as a harmoni-us whole. Those purposes are impeded, if not defeated, if shippers and carriers are held immune to the Act with respect to shipments from points in the United States to foreign countries in so far as transportation and contracts with respect thereto carried on in the United States are concerned, as the Court of Civil Appeals has held to be the case.

It is quite obvious the "Regulations issued by the Interstate Commerce Commission, under authority of Sec. 6 of the Interstate Commerce Act, as amended, to govern the construction and filing of freight rate schedules and [fol. 147] classifications, * * * by common carriers as defined in said Act," known as Tariff Circular No. 20, approved June 11, 1928 and effective Octomer 1, 1928, and yet in force, do not contemplate any such open avenue for rebating and discrimination, nor withholding from the Interstate Commerce Commission and the public full information

as to every rate and contract with respect to transportation in the United States between every carrier in the United States and every other carrier participating in such rate, no matter wheresuch other carrier reside, or, the ultimate destination. This is accomplished through said Regulations without any attempt to exercise extra-territorial jurisdiction of any sort. Said Regulations apply without exception to every domestic carrier within the United States. Courts take judicial notice of these Regulations and they have the force of law. Lilly v. Grand Trunk Co., 317 U. S. 481, 63 S.C.R. 347.

Said regulations define "joint tariffs" as those which contain "joint rates," and define "joint rate" as rates "that extend over the lines of two or more carriers and that are made by arrangement or agreement between such carriers and evidenced by concurrence or power of attorney," and define "through rate" as "the total rate from point of origin to destination. It may be a local rate, a joint rate, or a combination of separately established rates." (Page 1, said Regulations).

Rule 13 (a) stipulates "tariffs and supplements thereto shall be filed by proper or duly authorized agent of the carrier. When filed by an officer, the concurrence, and when filed by an agent, the power of attorney or concurrence of every carrier participating therein must be on file with the Commission or accompany the tariff or supplement (See Rules 18 to 25 inclusive). * * *

[fol. 148] "(c) Tariffs must be filed by the issuing carrier or agent * * * Such tariffs must be posted at stations of carriers participating therein in the manner required by law."

Rules 18 to 25, inclusive, meticulously provide in detail the exact forms of powers of attorney to be executed by carrier participating in a tariff filed by another with the Commission; forms evidencing concurrence in the rate and tariffs so filed; forms for the concurring carrier expressly evidencing its assent to participate in the rate and tariff filed by an agent; forms providing for revocation of power of attorney and of concurrences and for transfer of authority from one agent to another to file rates and tariffs.

Said regulations compel the Mexican Lines to do nothing, unless, through contract arrangements are made with a

domestic carrier and both enter into through-rate agreements upon which the domestic carrier proposes to engage upon through transportation from a point in the United States to a point or points in Mexico. In such event, the domestic carrier becomes the issuing carrier under the Regulations, and it is required to file with the Commission its rates, tariffs and agreements with the Mexican participant and post them as required by law, and in addition thereto to file with the Interstate Commerce Commission affidavits of agency and concurrence, and agreement by the foreign carrier to abide by the rates and tariffs and contracts so filed.

Thus, through direct action on the domestic carrier the Commission is placed in full knowledge of the through rates and tariffs, if any, upon which through transportation is to be engaged. This construction and these Regulations by the Interstate Commerce Commission enable it to keep [fol. 149] closed the doors to rebating and discrimination in transportation from the United States to points in Mexico. The construction of the Court of Civil Appeals would throw such doors wide open. Under the Regulations and construction of the Interstate Commerce Commission, should the foreign lines disregard their agreements filed with the Commission to abide by and respect the rates and tariffs, the remedy of the Commission is to cancel out the tariffs and schedule and put an end to the domestic carrier's right to further engage upon the through transportation.

Surely, the Congress never intended, as the opinion of the Court of Civil Appeals would accomplish, that a domestic carrier be required upon authority of Sec. 20, Par. 11, Title 49 U.S.C.A., to itself pay for negligence in Mexico where there was no through rate, and no agreement between said carriers whereby the domestic carrier would be reimbursed should it be required to pay for the Mexican negligence, and the parties, themselves, did not intend or understand the domestic carrier was contracting for safe delivery at the foreign destination.

If the through transportation may not be engaged upon until compliance with Sec. 6 of the statute, and with the Regulations of the Commission promulgated under its construction thereof, it is to be assumed that it was contemplated by Sec. 20, Par. 11 the romestic carrier would, as a part of its contract with the foreign carrier, secure protection for reimbursement of monies it may be required

under Sec. 20, Par. 11, 499 U.S.C.A. to pay for foreign negligence. Such payments come from domestic revenue and of necessity enter into domestic rate structures. When the domestic carrier tenders for filing with the Commission rates, tariffs and proposed contracts with foreign carriers to govern through foreign transportation, if no such pro-
[fol. 150] tection is provided it is clear it would be within the province of the Commission in exercise of its supervisory powers over the domestic carrier to refuse to permit it to file such proposed through rates and tariffs, unless it secured and filed appropriate protection.

So, the Act may be construed and upheld as a whole, without any attempt to exercise extra-territorial jurisdiction in so far as transportation from a point in the United States to a point in an adjacent foreign country takes place within the United States.

Conclusion

Petitioner submits in conclusion:

1. Reversal and rendition of the judgment by the Trial Court necessarily involve holding as matter of law that Petitioner and Respondent intended and understood the instrument sued upon to be a through bill of lading from Laredo, Texas, to El Oro, Mexico, when issued, and was error. Sec. 20, Par. 11, Title 49 U. S. C. A., can be given no application here, unless a through bill of lading contract was first made. No obligation to contract for through transportation existed here as does exist in the case of interstate transportation. Therefore, the through bill of lading existence must be determined as such tested solely by rules of general law. There, unless the mutual intention of such contract is unmistakably expressed in its language, it does not exist as such as matter of law. The instrument here does not unmistakably evidence such contract from its face. It is expressly subject to existing rates and tariffs, and there were none. In express language, it excluded any obligation to deliver beyond Petitioner's own line.

Petitioner had made no effort to comply with the Interstate Commerce Act and the regulations of the Commission [fol. 151] with respect to through transportation to Mexico. It had no agreement with the Mexican Lines authorizing Petitioner to issue contracts binding them; nor for pro-

tection of Petitioner against being required to pay, without recourse, for Mexican negligence, in event a through bill of lading was issued; nor to receive any portion of through transportation charges, whatever they were.

Respondent had the unquestioned right in seeking to recover its damages to file as many suits in as many places as it chose. But, it goes a long way to hold as matter of law, as the Court of Civil Appeals has held, that filing and prosecuting to judgment a suit in Pennsylvania upon the claim the Sharon, Pa. bill of lading was a through bill of lading to El Oro, Mexico, within the statute, instead of first trying out Petitioner on the claim that it issued the through bill of lading to El Oro, Mexico, will not sustain an inference that Respondent never understood in fact when the instrument here sued upon was issued it, and not the Sharon, Pa., was a through bill of lading. Certainly, Respondent could not have understood it held two through bills of lading and could recover on both, or, at its option, on one thereof, for the same shipment. At best for Respondent, it was in doubt.

2. No contract tested solely by rules of general law may be the basis for a judgment where no lawful consideration of any sort may be found therefor. Consideration for the instrument sued upon to transport to El Oro, Mexico, is patently excluded by this record, unless that relied upon by the Court of Civil Appeals constitutes lawful consideration. That consideration is gathered from the share received by Petitioner from the freight charges paid from Sharon, Pa., to the boundary line fixed by law as the consideration due for transporting the shipment from Sharon, Pa., and delivering it at the boundary line. The law fixed [fol. 152] the compensation and the service. Sec. 6, Par. 7, 49 U.S.C.A., in clear terms forbids Petitioner, under a penalty, to extend to any shipper in consideration for a lawful rate any service of any sort not stipulated in the tariff. To extend the share of charges Petitioner received under the Sharon bill of lading as consideration for the instrument sued upon as a through bill of lading to El Oro, Mexico, a new and additional undertaking not specified in the tariff, challenges legal credulity.

3. Reversal and rendition of the judgment of the Trial Court necessarily involved a construction of Sec. 1, Par.

2 and of Sec. 6, Par. 1, 4, 5, 6, 7 and 10, Title 49 U.S.C.A., and of the regulations of the Interstate Commerce Commission with respect thereto, to be inapplicable to a shipment from a point in the United States to a point in Mexico. This means not less than Congress has effectively provided against rebates and discriminations with respect to Interstate Commerce transportation, but has left the field for rebates and discriminations wholly unprotected with respect to shipments of property from points in the United States to points in foreign countries, and has simultaneously imposed upon domestic carriers liability for Mexican negligence in course of transportation under unregulated contracts. The Court of Civil Appeals says to hold otherwise would restrict the intention of Congress to extend initial carrier liability to foreign commerce. Surely, the Act does not exclude any other nor exact such construction. Congress could scarce have intended that everything contained in the Interstate Commerce Act designed to prohibit rebating and discriminating must be sacrificed, as to foreign commerce, for initial carrier liability. The statute plainly retains jurisdiction over foreign commerce in so far as the transportation occurs in the United States. Regulations [fol. 153] prescribed by the Interstate Commerce Commission to carry out the intent and purposes of the Interstate Commerce Act equally apply to foreign as well as to domestic commerce so long as transportation of the foreign commerce takes place within the United States. The holding of the Court of Civil Appeals disregards and denies effect to those Regulations.

4. To hold Petitioner liable for Mexican negligence under Sec. 20, Par. 11, 49 U. S. C. A., where the instrument sued upon was: (1) not intended nor understood by the parties to be a through bill of lading; (2d) was issued without consideration; (3d) may be done only by holding the transportation from Laredo to El Oro to be subject to Sec. 20, Par. 11 of the Act, but that no other part of the Act nor the Regulations of the Commission are applicable to the transportation, is unreasonable.

To say that transportation may be lawfully engaged upon under the Act when no rates or tariffs have been published or posted, as required by the Act and Regulations, is to utterly destroy by construction efficacy in any attempt to prevent rebating and discrimination and to en-

force equality of rates and service, for, if transportation may be lawfully engaged upon without disclosure or posting of rates and tariffs, by what may rebating or discrimination be tested? Clearly, the requirements for posting and publishing rates as condition precedent to engaging upon the transportation is the very foundation cornerstone for the entire effort through the Act to regulate transportation and to enforce equality therein.

The rule relied upon by the Court of Civil Appeals that violation of a statute does not defeat recovery for tort, is wholly foreign to the point here. In no case relied [fol. 154] upon by the Court of Civil Appeals was recovery conditioned upon non-violation of or compliance with a statute. In every case cited by the Court of Civil Appeals violation or non-compliance was necessarily raised as an affirmative defense.

Here, the statute relied upon to impose initial carrier liability upon Petitioner is expressly conditioned upon there having been first issued by the carrier a "through bill of lading." That condition was not present in any case cited by the Court of Civil Appeals. In language too clear and simple about which to quibble Congress made a "through bill of lading" condition precedent to initial carrier liability under Sec. 20, Par. 11, 49 U. S. C. A., for shipments from a point in the United States to a point in an adjacent foreign country. The existence of that contract is by the statute essential upon which to impose its liability.

The Court of Civil Appeals avoided compliance with this condition precedent by the holding that no rate is necessary to a valid through bill of lading and that limitations upon the power of a carrier to engage upon transportation without first filing rates and tariffs has no application to a shipment from a point in the United States to a point in a foreign country. Upon such premises the Court of Civil Appeals holds, therefore, the instrument sued upon is a "through bill of lading" sufficient to sustain that contemplated and required by Sec. 20, Par. 11, 49 U. S. C. A. The ultimate foundation for the judgment of the Court of Civil Appeals tenders an inescapable construction of Sec. 20, Par. 11, 49 U. S. C. A., that the "through bill of lading" therein required has no reference to one recognized by the Act itself. If the Court of Civil Appeals has correctly grasped and construed the Interstate Com-

merce Act, possibilities of rebating and discriminating [fol. 155] with immunity in the United States with respect to transportation partly conducted and contracts wholly made therein, which Congress has studiously endeavored to eliminate for nearly 60 years, become unlimited.

Prayer

Wherefore, Petitioner prays this Application be granted and, upon a hearing, that the errors herein assigned be corrected and the judgment of the Court of Civil Appeals thereupon be reversed, that of the Trial Court affirmed, for general relief and its costs.

Respectfully submitted, J. D. Dodson, Marcellus Eckhardt, Elmore H. Borchers, Chas. W. Duke; by J. D. Dodson, Attorneys for Petitioner.

A copy of this Application for Writ of Error has been mailed, postage prepaid, to Messrs. Fulbright, Crooker, Freeman & Bates, State National Bank Building, Houston 2, Texas, who are attorneys of record for Respondent.

J. D. Dodson, Marcellus Eckhardt, Elmore H. Borchers, Chas. W. Duke; by J. D. Dodson, Attorneys for Petitioner.

[fol. 156] Appendix

The following are the statutes cited in Appellee's Brief:—Section 6, par. 1, 49 U. S. C. A.:

". . . every common carrier subject to the provisions of this chapter shall file with the Commission created by this chapter, and print and keep open to public inspection schedules showing all the rates, fares and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad . . . when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried,

and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect or determine any part of the aggregate of such aforesaid rates, fares and charges, or the value of the service rendered to the passenger, shipper or consignee."

Section 6, par. 4, 49 U. S. C. A.:

"Joint tariffs. The names of the several carriers which are parties to any joint tariff shall be specified therein, and each of the parties thereto, other than the one filing the same, shall file with the commission such evidence of concurrence or acceptance is filed it shall not be necessary for the carriers filing the same to also file [fol. 157] copies of the tariffs in which they are named as parties."

Section 6, par. 5, 49 U. S. C. A.:

"Copies of traffic contracts to be filed. Every common carrier subject to this chapter shall also file with said commission copies of all contracts, agreements, or arrangements with other common carriers in relation to any traffic affected by the provisions of this chapter to which it may be a party."

Section 6, Par. 7, 49 U. S. C. A.:

"Transportation without filing and publishing rates forbidden; rebates; privileges. No carrier, unless otherwise provided by this chapter, shall engage or participate in the transportation of passengers or property, as defined in this chapter, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this chapter; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time;

nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

Section 20, par. 11, 49 U. S. C. A.:

"Liability of initial carrier for loss; limitation of liability; notice and filing of claim. Any common carrier, railroad, or transportation company subject to the provisions of this chapter receiving property for transportation from a point in one State or Territory [fol. 158] or the District of Columbia to a point in another State, Territory, District of Columbia, or from any point in the United States to a point in an adjacent foreign country shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever, shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed; and any such common carrier, railroad, or transportation company so receiving property for transportation from a point in one State, Territory, or the District of Columbia to a point in another State or Territory, or from a point in a State or Territory to a point in the District of Columbia, or from any point in the United States to a point in an adjacent foreign country, or for transportation wholly within a Territory shall be liable to the lawful holder of said receipt, or bill of lading or to any party entitled to recover thereon, whether such receipt or bill of lading has been issued or not, for the full actual loss, damage, or injury to such property caused by it or by any such common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such prop-

erty may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, ..."

[fol. 149] Section 1, par. 2, 49 U. S. C. A.:

"Transportation subject to regulation. The provisions of this chapter shall also apply to such transportation of passengers and property and transmission of intelligence, but only in so far as such transportation or transmission takes place within the United States - - -."

REGULATIONS I. C. C.

"Regulations Issued By the Interstate Commerce Commerce Commission Under Authority of Section 6 of the Interstate Commerce Act, As Amended, to Govern the Construction and Filing of Freight Rate Schedules and Classifications, and Pipe Line Schedules, By Common Carriers, As Defined in Said Act.

Approved June 11, 1928

Effective October 1, 1928

(Except as noted in individual rules)

Freight Tariffs and Classifications

• • •

"All tariffs filed on or after October 1, 1928, except as otherwise provided herein or unless otherwise authorized by special permission of the commission, must conform to these rules. The commission may direct the re-issue of any tariff, power of attorney, or concurrence at any time.

• • •

"The term 'through rate' is construed to mean the total rate from point of origin to destination. It may be a local rate, a joint rate, or a combination of separately established rates." (Page 1 of said Regulations.)

[fol. 160] • • •

"13. (a) Tariffs and supplement thereto shall be filed by proper officer or duly authorized agent of the carrier. When filed by an officer, the concurrence, and when filed by an agent, the power of attorney or concurrence, of every carrier participating therein must be on file with the com-

mission or accompany the tariff or supplement. (See rules 18 to 25, inclusive). * * *

"(c) Tariffs must be filed by the issuing carrier or agent, and such filing will constitute filing for all carriers parties thereto. (See rule 26 (j). Such tariffs must be posted at stations of carriers participating therein in the manner required by law.

"(d) The agent or the carrier that issues a joint tariff publication shall at once send copies thereof to each and every carrier that is named as party thereto." (Page 51 of said Regulations.)

(Rules 18 to 25 inclusive, pages 59 to 66 inclusive, of said Regulations, in detail prescribe forms for giving authority to an attorney and agent to file tariffs; to receive concurrences and to give authority to another carrier to give and receive concurrences; forms for giving concurrences in a tariff issued and filed by another carrier or agent; forms for assent to and concurrence in the published tariff and rate; forms for revocation of powers of attorney and of concurrences.)

Certificate

At the time of filing this Application with the Clerk of the Court of Civil Appeals a true copy of said Application is deposited with the Clerk of said Court and Messrs. Fulbright, Crooker, Freeman and Bates, Attorneys of Record for Respondent and whose Post Office address [fols. 161-162] is State National Bank Building, Houston, Texas, have been notified of the deposit of said copy.

J. D. Dodson, San Antonio, Texas, Marcellus Eckhardt, Corpus Christi, Texas, Elmore H. Borchers, Laredo, Texas, Charles W. Duke, San Antonio, Texas; by J. D. Dodson, Attorneys for Petitioner.

[fol. 163] IN THE SUPREME COURT OF TEXAS

ORDER GRANTING APPLICATION FOR WRIT OF ERROR—February 13, 1946

[Title omitted]

This day came on to be heard the application of Petitioner for a writ of error to the Court of Civil Appeals for the

Fourth District, and the same having been duly considered, it is ordered that the application be granted and the writ of error issue as prayed for upon the filing by Applicant of a bond in the sum of $800.00, conditioned to pay the costs of this Court, the Court of Civil Appeals and District Court, payable to the adverse party as prescribed by law.

[fol. 164] IN THE SUPREME COURT OF TEXAS

FROM NUECES COUNTY, FOURTH DISTRICT

THE TEXAS MEXICAN RAILWAY COMPANY, Petitioner,

v.

MEXICAN LIGHT & POWER COMPANY, LTD., Respondent

OPINION—April 17, 1946

This is a suit by Mexican Light & Power Company, Ltd., a Canadian corporation, respondent, against The Texas Mexican Railway Company, a Texas corporation, petitioner, for damages on account of injuries to electrical machinery resulting from a derailment in the Republic of Mexico on the lines of the National Railways of Mexico. Liability is sought to be imposed upon petitioner under the provisions of the Cummings Amendments to the Carmack Amendment. 49 U. S. C. A., Sec. 20 (11). The judgment of the trial court denied respondent any recovery, but that judgment was reversed by the Court of Civil Appeals and judgment rendered in its favor for the stipulated amount of its damages. 190 S. W. (2d) 838.

The statute relied upon by respondent to fix the liability of petitioner is copied as a footnote to the opinion of the Court of Civil Appeals. Under the provisions of that statute, if petitioner received the machinery for transportation from a point in the United States (Laredo, Texas) to a point in an adjacent foreign country (El Oro, Mexico) and for a valuable consideration issued to respondent a through bill of lading covering the shipment from its yards in Laredo to El Oro, then it is liable to respondent for the damages sustained on account of the negligence [fol. 165] of the National Railways of Mexico, a connecting carrier; otherwise it is not liable therefor.

The facts were stipulated and those deemed controlling will be summarized in this opinion. The machinery was purchased by respondent from Westinghouse Electric & Manufacturing Company, which company delivered it to the Pennsylvania Railroad Company at Sharon, Pa., for transportation to El Oro, Mexico. That company issued to the consignor a uniform straight bill of lading consigning the machinery to respondent, in care of Fausto Trevino, Customs Agent at Laredo, Texas. The bill of lading disclosed that the freight charges had been prepaid and carried on its face this notation, "For Export To: El Oro, Estado De Mexico, Via Acambaro, via Laredo." The shipment went forward from Sharon, Pa., over the Pennsylvania Railroad line and connecting carriers to Alice, Texas, where same was delivered to petitioner and by it transported to its yards in Laredo. On the day after the shipment arrived at Laredo, petitioner issued the instrument claimed by respondent to be a through bill of lading from Laredo, Texas, to El Oro, Mexico. Upon this instrument respondent bases its alleged cause of action against petitioner. It was prepared upon a form employed by petitioner and on its face appears to be a regular bill of lading. It recites that the shipment was received from Fausto Trevino; that same was consigned to respondent, destination El Oro, "State of Mexico", via Acambaro. No rates or charges for transportation are named in the instrument, but on its face there is printed over the typewritten signature of the consignor, Fausto Trevino, the following: "The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges." After issuing this instrument, petitioner delivered same to Trevino who then completed his arrangements with the Mexican Customs Office for transportation into Mexico. He then notified petitioner of that fact and [fol. 166] thereupon petitioner moved the cars, laden with the machinery, from its yards to the middle of the International bridge between Laredo, Texas, and Nuevo Laredo, Mexico. Here they were picked up by National Railways of Mexico and transported to a point in the interior of Mexico where the derailment occurred resulting in the damages sued for herein.

Additional facts taken from the stipulations are: that when this shipment was made no through railroad tariff was in effect governing such shipment from either Sharon,

Pa., or Laredo, Texas, to El Oro, Mexico, or any other point in Mexico; that Fausto Trevino, who acted as agent for respondent in the matter, did not pay petitioner for carrier charges or any other charges than those applicable from Sharon, Pa., to Laredo, Texas, which included bringing the shipment to the international border line where it was delivered to the National Railways of Mexico; that the shipment moved into Mexico on the same cars on which same was loaded at Sharon, Pa.; that petitioner received no portion of the revenue paid the National Railways of Mexico for transporting the shipment in question from the international border line into the Republic of Mexico and had no agreement to receive any portion of such revenue or agreement whereby it may recoup or be reimbursed for any damages it may pay on account of the negligence of the Mexican lines; that, of the freight charges paid at Sharon, Pa., petitioner received 15.02 per cent, which amounted to $248.70; that that amount was its compensation for transporting the shipment from Alice, Texas, to Laredo, Texas, and for delivering same to the international boundary line; that such freight charges were based upon the export rate from Sharon, Pa., to Laredo, Texas, which rate was slightly lower than the domestic rate and was applicable because the Sharon bill of lading had endorsed on it "for export".

[fol. 167] Respondent made claim for damages against the National Railways of Mexico, which was rejected. Suits were then filed against the Pennsylvania Railroad Company and petitioner, upon the alternative theories, (1) that the former was an initial carrier, under the Sharon bill of lading, and (2) that petitioner was the initial carrier under the Laredo bill of lading.

The Pennsylvania suit was tried first and resulted in a judgment in favor of the carrier. Mexican Light & Power Co., v. Pennsylvania R. Co., 33 F. Supp. 483, 485. It was held in that case that the Sharon bill of lading was not a through bill of lading to El Oro, Mexico.

It is our view that no consideration whatever moved to petitioner or from respondent for the issuance of the Laredo bill of lading. Petitioner did not receive this shipment for transportation at its yards in Laredo, but received same for transportation as an agent of the initial carrier, the Pennsylvania Railroad, at Alice, Texas, under a bill of

lading issued by the initial carrier imposing upon petitioner the duty to transport same to the international boundary line. The consideration for the service thus imposed upon petitioner and later performed by it had theretofore been paid to its principal, the Pennsylvania Railroad. No other consideration was paid or promised petitioner and no other service was performed for that consideration. The shipment did not come to rest in the yards of petitioner at Laredo and then move forward therefrom to a new destination under a new bill of lading. The Sharon bill of lading was not discharged until the shipment reached the center of the bridge; otherwise the higher domestic rate would have been applicable. The entire transportation from Sharon, Pa., to the international boundary line was governed by the Sharon bill of lading and not at all by the Laredo bill of lading. Missouri, Kansas & Texas Ry. Co. v. Ward, 244, U. S. 383. From the opinion in that case this quotation is taken:

> [fol. 168] "* * * The bill of lading required to be issued by the initial carrier upon an interstate shipment governs the entire transportation. The terms of the original bill of lading were not altered by the second issued by the connecting carrier. As appellants were already bound to transport the cattle at the rate and upon the terms named in the original bill of lading, the acceptance by the shipper of the second bill was without consideration and was void."

This statement is taken from the opinion in Panhandle & S. F. Ry. Co., v. McCrummen, 240 S. W. 607, 609:

> "* * * An initial carrier is authorized to issue a through bill of lading, binding upon it and the connecting carrier as well. This is the only bill or receipt authorized for the entire shipment, and one issued by a connecting carrier is of no binding force or effect unless upon a new or independent consideration moving to the shipper. Evidently by this addition to the amendment it was intended to adopt the same rule applied in interstate shipments under the Interstate Commerce Act (U. S. Comp. St. Sec. 8563 et seq.) Railway Co. v. Ward, 244 U. S. 383; 37 Sup. Ct. 617, 61 L. Ed. 1213; Railway Co. v. Word (Tex. Civ. App.) 159 S. W. 375 (3-5)."

We do not agree with the proposition that the consideration paid petitioner under the Sharon bill of lading for transportation from Alice to the international boundary line constituted also a consideration for the issuance by it of a new bill of lading under which it assumed liability for the negligence of National Railways of Mexico.

The movement of the freight under the Laredo bill of lading began, if at all, in the center of the International bridge at the beginning point of the National Railways of Mexico and continued wholly on such lines. Does a carrier incure liability for damages resulting from the negligence of a connecting carrier by the issuance of its bill of lading, without consideration, covering a shipment which never moves over its own lines but which begins on and moves wholly over the lines of such connecting carrier? We find nothing in the statute under review warranting an affirmative answer to that question. For a carrier to incur liability as the initial carrier under the Carmack or Cummings Amendments, it must be an initial carrier in fact. In Ga. So. & F. Ry. Co., v. Tipton Produce Co., 176 S. E. 89, the railway company sought to be charged was actually affiliated with the Southern Railway Company as a part of a system and in pursuance of an arrangement under which it might benefit indirectly such company issued its through bill of [fols. 169-170] lading covering a car of melons routed over the Southern Railway Company and connecting carriers to a point in New York. The shipment did not move under the bill of lading issued by the carrier sought to be charged over any portion of its lines, but wholly over the lines of other carriers. In that case liability was asserted under the Carmack Amendment against the company which issued the bill of lading for damages resulting from the negligence of another carrier over whose lines the shipment moved. After reciting that the defendant received no part of the freight charges the opinion states:

> "• • • nor can it be held liable as initial carrier for the negligent acts of other carriers, since it never received the 'property for transportation,' within the language and meaning of the interstate commerce acts. The agents of a railroad company that is not in fact an initial carrier cannot by mere written fiat assume for it such a status."

In this case it cannot be said that petitioner received the "property for transportation" at Laredo within the meaning of the statute, that any consideration moved to it for the execution by it of a through bill of lading from Laredo to El Oro, or that it transported or undertook to transport the property under such bill of lading over any portion of its own line. It is therefore concluded that liability cannot be imposed upon petitioner for the negligence of the National Railways of Mexico under the Cummings Amendments of the Carmack Amendment. The judgment of the Court of Civil Appeals is reversed and the judgment of the trial court affirmed.

J. E. Hickman, Associate Justice.

JEH: s.
Opinion delivered 17 April 1946.

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[fols. 171-172] In Supreme Court of Texas

No. A-813

From Nueces County, Fourth District

The Texas Mexican Railway Co.,

vs.

Mexican Light & Power Co. Ltd.

Judgment—April 17, 1946

This cause came on to be heard on writ of error to the Court of Civil Appeals for the Fourth Supreme Judicial District, and the original transcript in said cause being before the court, as well as the transcript showing the proceedings had in said Court of Civil Appeals, and these having been duly considered, because it is the opinion of the Court that there was error in the judgment of the Court of Civil Appeals, which reversed and rendered judgment for the Respondent herein for the stipulated amount of its damages, but no error in the judgment of the District Court, it is therefore Ordered, Adjudged and Decreed that the judgment of the Court of Civil Appeals be reversed and the judgment of the District Court be in all things affirmed.

It is further ordered that the Petitioner, The Texas Mexican Railway Company, do have and recover of and from the Respondent, Mexican Light & Power Co. Ltd., and its surety, Fidelity & Deposit Company of Maryland, all costs in this behalf expended in this Court and the Court of Civil Appeals, and this decision be certified to the District Court for observance.

[fol. 173] IN THE SUPREME COURT OF TEXAS

[Title omitted]

RESPONDENT'S MOTION FOR RE-HEARING—Filed May 1, 1946

To the Honorable Supreme Court of Texas:

Now comes Mexican Light & Power Company, Ltd., Respondent, and files this its motion for rehearing, and for the errors hereinafter set forth, respectfully moves the Court in all things to set aside the opinion of the Court delivered and filed on April 17, 1946, and the judgment ordered entered thereon, to award a rehearing and upon rehearing affirm the judgment of the Court of Civil Ap-
[fol. 174] peals, and therefor says:

First

The Court erred in holding that no consideration whatever moved to Petitioner or from Respondent for the issuance of the Laredo bill of lading (the bill of lading issued by Petitioner, dated September 29, 1934).

Second

The Court erred in holding that Petitioner received the shipment involved for transportation as an agent of the Pennsylvania railroad under a bill of lading issued by the Pennsylvania railroad imposing upon Petitioner the duty to transport same to the International Boundary Line, in direct contradiction of Petitioner's express pleading to the effect that Petitioner was not a delivering carrier of the shipment either in fact or in contemplation of the Cummings Amendment to the Federal Transportation Act.

Third

The Court erred in holding that Petitioner did not receive the "property for transportation" within the meaning of the provisions of 49 U. S. C. A., Section 20 (11) to the effect that a common carrier receiving property for trans- [fol. 175] portation from any point in the United States to a point in an adjacent foreign country shall issue a receipt or bill of lading therefor, and shall be liable as an initial carrier as otherwise provided therein.

Fourth

The Court erred in holding that Petitioner did not transport or undertake to transport the shipment over any portion of its own line under the bill of lading issued by Petitioner to Respondent.

Fifth

The Court erred in holding that the consideration paid Petitioner under the Sharon bill of lading did not constitute also a consideration for the issuance by it of the new bill of lading issued by Petitioner providing for transportation of the shipment from Laredo, Texas, to El Oro, Mexico.

Sixth

The Court erred in failing to hold that the bill of lading issued by Petitioner is a valid through bill of lading from Laredo, Texas, to El Oro, Mexico within the meaning of U. S. C. A. Title 49, Section 20 (11).

Seventh

The Court erred in failing to hold that Petitioner's [fol. 176] issuance of the bill of lading of September 29, 1934, is fully supported by valuable consideration.

Eighth

The Court erred in failing to hold that the through bill of lading issued by Petitioner was a valid, legal through bill of lading from Laredo, Texas, to El Oro, Mexico.

Ninth

The Court erred in finding and holding that the shipment involved never moved over Petitioner's own lines, but began

on and moved wholly over the lines of National Railways of Mexico.

Tenth

The Court erred in failing to hold Petitioner liable for the damages to the shipment involved, as an initial carrier under the provisions of U. S. C. A. Title 49, Section 20 (11).

Eleventh

The Court erred in reversing the judgment of the Court of Civil Appeals in favor of Respondent and in affirming the judgment of the Trial Court in favor of Petitioner.

Twelfth

The Court erred in so construing the Federal Statute [fol. 177] involved, U. S. C. A. Title 49, Section 20 (11), as to relieve Petitioner from the liability therein imposed as an initial carrier of the shipment involved under Petitioner's bill of lading dated September 29, 1934.

Thirteenth

The Court erred in holding that movement of the freight under Petitioner's bill of lading began "if at all, in the center of the International Bridge at the beginning point of the National Railways of Mexico and continued wholly on such lines".

Fourteenth

The Court erred in failing to hold that the movement of the freight under Petitioner's bill of lading began, and was initiated in the freight yards of Petitioner in Laredo, Texas, at which point the shipment was located and from which it had not been removed at the time of the issuance by Petitioner of its bill of lading, under the undisputed stipulated facts.

Wherefore, for the reasons set forth, Respondent respectfully moves the Court to grant a rehearing, to thereupon correct each of the several errors hereinbefore assigned, to set aside the opinion and judgment heretofore [fol. 178] rendered, to affirm the judgment of the Court

of Civil Appeals, and to award Respondent its costs and general relief.

Respectfully submitted,

Johns & McCampbell, Corpus Christi, Texas, Fullbright, Crooker, Freeman, Bates, Houston, Texas, Chas. W. Bell, Houston, Texas.

Respondent represents that Mr. J. D. Dodson, whose post office address is San Antonio, Texas, is attorney of record for Petitioner and that a true and correct copy of this motion has been delivered to him by depositing same in the United States mails at Houston, Texas, addressed to him, postage prepaid.

Chas. W. Bell, Attorney for Respondent.

[fol. 179] IN THE SUPREME COURT OF TEXAS

ORDER OVERULING MOTION FOR REHEARING—Filed May 15, 1946

[Title omitted.]

The motion for rehearing filed herein by the Respondent having heretofore been submitted to the Court, and after due consideration of same, it is ordered that the said motion be, and is hereby, overruled.

[fol. 180] IN THE SUPREME COURT OF TEXAS

[Title omitted]

PRAECIPE FOR TRANSCRIPT OF RECORD—Filed July 6, 1946

To the Clerk of said court:

You are hereby requested to make a transcript of the record to be filed in the Supreme Court of the United States, pursuant to a Petition for Writ of Certiorari in the above styled cause, and to include in said Transcript of Record, the following papers and exhibits, to-wit:

1. Caption and style of case.
2. The transcript filed in the Court of Civil Appeals, (including all exhibits therein contained.)

3. The State of Facts filed in the Court of Civil Appeals (including all exhibits therein contained.)
4. Opinion of the Court of Civil Appeals.
5. Judgment of the Court of Civil Appeals.
6. Motion for rehearing in Court of Civil Appeals.
7. Order overruling motion for rehearing in Court of Civil Appeals.
8. Application for writ of error.
9. Order granting writ of error.
10. Opinion of Supreme Court of Texas.
11. Judgment of Supreme Court of Texas.
12. Motion for rehearing in Supreme Court of Texas.
13. Order of the Supreme Court of Texas overruling motion for rehearing.

[fol. 181] 14. Praecipe for transcript of record.
15. Counter Praecipe (if any).
16. Bill of costs.
17. Clerk's certificate.

This transcript to be prepared as required by law and the rules of this Court and the rules of the Supreme Court of the United States and to be filed in the office of the Clerk of the Supreme Court of the United States on or before August 15, 1946.

Respectfully submitted, Johns & McCampbell, Fulbright, Crooker, Freeman and Bates, Chas. W. Bell. By (signed) Chas. W. Bell, Attorneys for Petitioner, Mexican Light & Power Company, Ltd.

I hereby certify that a true copy of this praecipe was sent by registered mail to the attorneys of record for Respondent, this the 5th day of July, 1946.

(Signed) Chas. W. Bell.

[File endorsement omitted]

[fol. 182] [Bill of costs omitted.]

[fol. 183] [Clerk's certificate to foregoing transcript omitted in printing.]

[fol. 184] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1946

No. 404

ORDER ALLOWING CERTIORARI—Filed October 14, 1946

The petition herein for a writ of certiorari to the Supreme Court of the State of Texas is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.